DOCUMENT RESUME

ED 430 827 SO 029 193

AUTHOR	Blanchard, Joan M.; Bender, Martin J. .
TITLE	Patriots, Pirates, Politicians and Profit Seekers: New Hampshire Cases and the U.S. Supreme Court.
INSTITUTION	New Hampshire Bar Association, Concord.
SPONS AGENCY	Department of Education, Washington, DC.
PUB DATE	1996-00-00
NOTE	116p.
CONTRACT	S123A40116-95
AVAILABLE FROM	New Hampshire Bar Association, Law-Related Education Program, 112 Pleasant Street, Concord, NH 03301.
PUB TYPE	Guides - Classroom - Learner (051)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Constitutional Law; *Court Litigation; High Schools; *Law Related Education; Laws; State History; State Legislation; United States History
IDENTIFIERS	Fourth Amendment; *New Hampshire; *Supreme Court; Supreme Court Justices; United States Constitution

ABSTRACT

This case book provides New Hampshire high school students and teachers with state specific law related information and activities. The 37 cases, selected according to their constitutional significance, are organized into 13 sections as follows: (1) "The Early Years"; (2) "Carpetbaggers, Speculators, and Investors"; (3) "Border Disputes"; (4) "Citizens of Other States"; (5) "The World of the Court"; (6) "Pink Margarine and Water Power"; (7) "Bankruptcy and the Fields"; (8) "It's a Free Country"; (9) "He Can't Say That! Can He?"; (10) "Questions of Fairness"; (11) "The Attorney General and the Communists"; (12) "Fugitives from Justice"; (13) "Mr. Coolidge and the Fourth Amendment"; and (14) "Justices of the Supreme Court from New Hampshire." A list of excluded cases, a glossary, and a bibliography conclude the book. (MM)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

SO

ED 430 827

Patriots, Pirates, Politicians and Profit Seekers

New Hampshire Cases and the United States Supreme Court

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE, AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY, HAS BEEN GRANTED BY

Holly Fazzino

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

2A

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

by

Joan M. Blanchard
Merrimack Valley High School
Penacook, NH 03303

and

Attorney Martin J. Bender
Barnes, Bender & Boehm
Concord, NH 03301

SO 029 193

Produced by the New Hampshire Bar Association
Law-Related Education Program

Funded by a grant from the U.S. Department of Education
Grant Award #S123A40116-95.

BEST COPY AVAILABLE

EQUAL JUSTICE
UNDER LAW
1873

Copyright 1996 © New Hampshire Bar Association
All rights reserved.
No use is permitted which will infringe on the copyright without the
express written consent of the New Hampshire Bar Association.

Typesetting & design by
Linden Jackett Murphy, Linden Design
August 1996

Patriots, Pirates, Politicians and Profit Seekers

New Hampshire Cases and the United States Supreme Court

by
Joan M. Blanchard
Merrimack Valley High School
Penacook, NH 03303

and

Attorney Martin J. Bender
Barnes, Bender & Boehm
Concord, NH 03301

Acknowledgments

It would have been impossible to prepare this book without the assistance of many people. We wish to thank our colleagues in Connecticut who gave us the original idea for this book. Also we are grateful to all the members of the Law-Related Education Advisory Board, with whom we have served. Special recognition goes to those members who served on the original committee to identify the possible cases. They are Jim Allmendinger, John Curran, Everett Edmunds, Sally Jensen, Jim Krowlikowski, Art Pease, and Howie Zibel. The continuing support from the staff of the New Hampshire Bar Association through the years has also been invaluable. We would like to especially thank Pat Barss, Holly Belson, and Pat Brent for their time and hard work. The staff members of the New Hampshire State Library, the Concord Public Library, and the New Hampshire Law Library were unfailingly helpful and courteous.

The Merrimack Valley School Board provided the opportunity to complete this work by granting a sabbatical. The students at Merrimack Valley High School have given us a testing ground for many years to try ideas, and we thank them, as well as the administrators and staff.

In closing, our gratitude goes to our families for their support, their willingness to listen to us talk about these cases, and their sacrifices which enabled us to finish this work.

Joan M. Blanchard
Martin J. Bender

Introduction

With an historic vote on June 21, 1788, New Hampshire ratified the new US Constitution. By being the ninth State to do so, New Hampshire was responsible for approval of the document which had been voted on by the delegates to the convention in Philadelphia the previous year.

In the more than two hundred years since that time, New Hampshire citizens have had many encounters with the US Supreme Court over the interpretation of the Constitution. Some of these cases have been memorable, establishing legal principles that have affected the relationship between citizens and our government. Others have interest today primarily for historians. We have selected those cases making constitutional history in one way or another to present in this book. It is our hope that learning about these cases will help students in New Hampshire appreciate the dedication and patience of the citizens who were willing to sacrifice in order to protect everyone's rights and freedoms.

This book is designed to provide students and teachers in New Hampshire high schools with information and activities that are specific to this State, to be used in conjunction with the study of our nation's history and government. We trust that using the book will bring them as much enjoyment as we received from researching and writing it.

Table of Contents

The Early Years 1
Penhallow v. Doane's Administrators
The St. Lawrence, Webb, Master
Trustees of Dartmouth College v. William Woodward

Carpetbaggers, Speculators and Investors 11
Louisiana v. Jumel
New Hampshire v. Louisiana

Border Disputes 17
State of Vermont v. State of New Hampshire
State of New Hampshire v. State of Maine

Citizens of Other States 21
Renaud v. Abbott
Bradford Electric Co., Inc. v. Clapper
Supreme Court of New Hampshire v. Kathryn A. Piper
Carl A. Austin, et al v. State of New Hampshire, et. al.
Kathy Keeton v. Hustler Magazine, Inc., et. al.

The Work of the Court 29
Land Company v. Saunders
Head v. Amoskeag Manufacturing Company
Parker v. Winnipiseogee Lake Cotton & Woolen Company

Pink Margarine and Water Power 39
Peirce, et. al. v. State of New Hampshire
Coe v. Town of Errol
Collins v. State of New Hampshire
H.P. Welch Company v. State of New Hampshire
Northeast Airlines, Inc., et. al. v. New Hampshire
  Aeronautics Commission, et. al.
New England Power Company v. State of
  New Hampshire, et. al.

Bankruptcy and the Fields 51
Field v. Mans

It's a Free Country... 55
Chaplinsky v. State of New Hampshire
Cox v. State of New Hampshire
Poulos v. State of New Hampshire
Wooley v. Maynard

He Can't Say That! Can He? 65
Rosenblatt v. Baer
Monitor Patriot Company v. Roy

Questions of Fairness 71
Dennis M. Vachon v. State of New Hampshire
Town of Newton, etc. et. al., v. Bernard E. Rumery, Jr.

The Attorney General and the Communists 77
Paul M. Sweezy v. State of New Hampshire
Willard Uphaus v. Louis C. Wyman
Hugo DeGregory v. Attorney General of the State of New Hampshire

Fugitives From Justice 87
Munsey v. Clough
Drew, Sheriff of Coos County v. Thaw
Fernandez v. Phillips, US Marshal

Mr. Coolidge and the Fourth Amendment 93
Coolidge v. State of New Hampshire

Justices of the US Supreme Court from New Hampshire 101
Levi Woodbury
David H. Souter

Cases Not Included 107

Glossary 109

Bibliography 113

The Early Years

Probably the most famous case to reach the US Supreme Court from New Hampshire is one of the earliest, the case of the *Trustees of Dartmouth College v. Woodward.* Less commonly known are the two cases that came even earlier. Each of these was about privateering, one from the Revolutionary War and the other from the War of 1812. All early cases from any State were potentially important because there were few if any precedents. The Supreme Court was establishing its place in the government and in the life of the nation; all of its actions had an impact.

Pirates or Not?

The Fight for Independence

Penhallow et. al.
v.
Doane's Administrators

Petitioner: *John Penhallow*
Respondent: *Administrators of Elisha Doane's estate*
Citation: *3 Dallas 54*
Lawyers: *William Bradford, US Attorney General; Mr. Ingersoll, Mr. Dexter, Mr. Tilghman, Mr. Lewis*
Started: *Nov. 11, 1777*
Decided: *February 24, 1795*
Who won: *Doane's Administrators*
Opinion: Seriatim, *first by Justice Paterson*

At the start of the Revolutionary War, the 13 colonies faced a formidable foe. With the largest navy in the world, Great Britain easily outnumbered the few vessels available to the colonies. For them to build, equip, and man ships to meet the British navy, it would take time. Until the colonies could defend the ports and their merchant ships, they would remain very vulnerable.

Some ship owners were authorized to become privateers by individual colonies and by the Continental Congress, to fulfill the pressing need for a navy. Privateers were people who privately owned ships that, after posting a bond to insure they would obey existing maritime laws, were issued letters of marque and reprisal. These letters authorized the armed ships to sail against the commercial or warships of the enemy. Once they captured an enemy ship it had to be brought to an American port and a trial held to determine who had the right of ownership of the ship and any cargo.

On July 3, 1776, New Hampshire's government enacted the recommendations of the Continental Congress on the topic of privateering. An admiralty court was established in Portsmouth with a judge and a twelve member jury to hear cases. The owner of a ship seized by a privateer had to prove why the vessel and its cargo should not be taken and should not be sold to benefit the privateers. Privateers were entitled to keep the entire value of ships seized with the profits being divided among owners, captain and crew according to a formula agreed upon prior to leaving port. A ship that was outfitted at government expense was entitled to keep one-third of the profits with the remaining two-thirds going to the government.

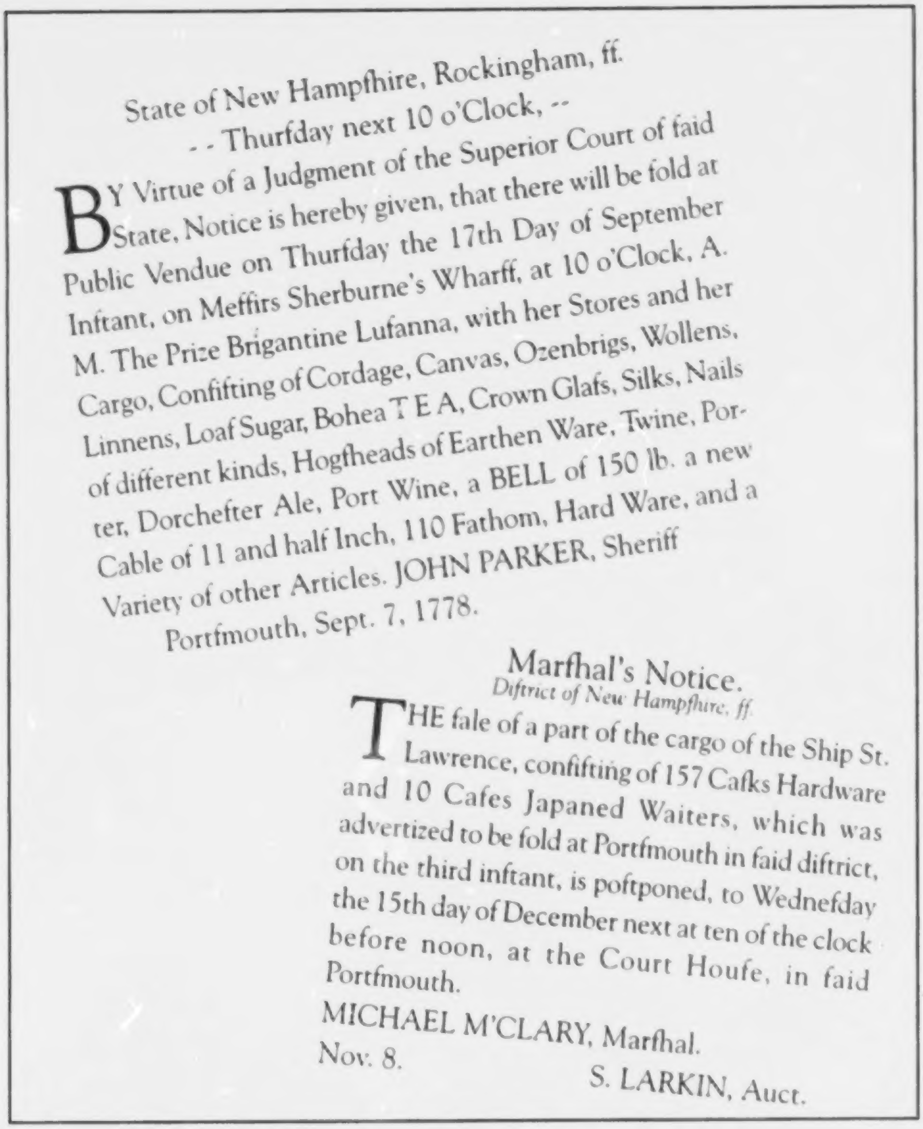
New Hampshire laws established an appeals process from the admiralty court to the state's Superior Court (then the highest State Court). If a vessel was authorized by the Continental Congress, it had the right of further appeal to a court established by the Continental Congress.

Approximately 100 privateers operated out of Portsmouth during the Revolutionary War. These vessels had crews ranging in size from thirty to fifty men and carried eight to ten guns. Despite the possibility of becoming a prisoner of the British or of being impressed into the British navy, the average man preferred to sail on a privateer rather than a ship of the official American navy because he could make more money. Crews' shares of profits from any ships seized were in addition to their wages.

Background

In the spring of 1775 before the war actually began, the ship *Susannah* (in some sources called the *Lusanna*) sailed for England with a cargo. It was owned by three men from Boston, Elisha Doane, Isiah Doane and James Sheppard. When the *Susannah* reached England, the Revolution was underway and the ship could be confiscated by the British. To prevent this, the ship's registration was transferred to Elisha Doane's son-in-law, who was a British subject. By 1777 the *Susannah* sailed to America under the British flag. Before it could reach its intended destination of Halifax, Canada, it was captured by the *McClary*, a privateer owned by eleven of Portsmouth's leading citizens, including John Penhallow.

On November 11, 1777, libels were filed in the NH Maritime Court.



State of New Hampſhire, Rockingham, ſſ.
-- Thurſday next 10 o'Clock, --

BY Virtue of a Judgment of the Superior Court of ſaid State, Notice is hereby given, that there will be ſold at Public Vendue on Thurſday the 17th Day of September Inſtant, on Meſſirs Sherburne's Wharff, at 10 o'Clock, A. M. The Prize Brigantine Luſanna, with her Stores and her Cargo, Conſiſting of Cordage, Canvas, Ozenbrigs, Wollens, Linnens, Loaf Sugar, Bohea T E A, Crown Glaſs, Silks, Nails of different kinds, Hogſheads of Earthen Ware, Twine, Porter, Dorcheſter Ale, Port Wine, a BELL of 150 lb. a new Cable of 11 and half Inch, 110 Fathom, Hard Ware, and a Variety of other Articles. JOHN PARKER, Sheriff

Portſmouth, Sept. 7, 1778.

Marſhal's Notice.
Diſtrict of New Hampſhire, ſſ.

THE ſale of a part of the cargo of the Ship St. Lawrence, conſiſting of 157 Caſks Hardware and 10 Caſes Japaned Waiters, which was advertized to be ſold at Portſmouth in ſaid diſtrict, on the third inſtant, is poſtponed, to Wedneſday the 15th day of December next at ten of the clock before noon, at the Court Houſe, in ſaid Portſmouth.

MICHAEL M'CLARY, Marſhal.
Nov. 8.
S. LARKIN, Auct.

N.H. Gazette or State Journal and General Advertiser, September 15, 1778, November 8, 1813

Judge Joshua Brackett heard the case on December 16, 1777. Joshua Wentworth and George Wentworth represented the owners and crew of the *McClary*. They argued that the *Susannah* was a British ship carrying contraband. The agent representing the *Susannah's* owners said it was an American ship in disguise returning voluntarily to its American owners. The jury found for the *McClary* and the *Susannah* was ordered to be sold with its cargo and the proceeds distributed to the *McClary*.

An appeal was immediately filed with the NH Superior Court. In

BEST COPY AVAILABLE

September of 1778 this court affirmed the lower court's decision and the *Susannah* was sold, with the prize money distributed to the *McClary's* owners and crew.

The NH Superior Court refused to permit the *Susannah's* owners to appeal to the Continental Congress, so Elisha Doane and his co-owners petitioned Congress to review the case. Congress referred it to the Continental Commissioners of Appeals. By June of 1779 the Commissioners had decided that they did indeed have the authority to hear the appeal. The case dragged on until 1783 when a new Court of Appeals established by the Articles of Confederation reversed the New Hampshire court's 1778 decision. Under the Articles of Confederation, this court had no way to enforce its decision and New Hampshire's government refused to do so, protesting the decision as an invasion of states' rights.

Another Court, Another Chance

The US Constitution became effective in 1787 and two years later by the Judiciary Act of 1789, federal courts were organized. The owners of the *Susannah* saw a new opportunity to recover their losses. Elisha Doane had died, but the administrators of this estate sued John Penhallow and the other *McClary* owners in US District Court in New Hampshire, asking the court to enforce the decision of the Confederation Court of Appeals. After a transfer to the US Circuit Court, the verdict was affirmed and damages of $38,500 were ordered to be paid to the owners of the *Susannah*.

Another appeal, this time by the *McClary's* owners, was filed with the US Supreme Court. The case was argued between February 6 and February 17, 1795. On February 24, 1795 the Court announced its decision (*Penhallow et. al. v. Doane's Administrators* 3 Dallas 54). The authority of the Confederation Court over the State Courts was affirmed and the verdict in favor of the *Susannah's* owners was upheld. This time the *McClary* owners carried out the court's decision and $38,500 was paid to the *Susannah* owners.

More Pirates?

When the United States declared war on Great Britain on June 18, 1812, the problems of defending the country against the world's largest naval power were the same as during the Revolutionary War. Privateers were still authorized to supplement the navy. Sailors who could earn the immense sum of $1000 in addition to their wages on a single cruise preferred to serve on privateers rather than in the navy

(Maclay, 1968, p. 7).

The *America* was built in 1804 for the East India trade and converted to a privateer. Owned by George Crowinshield and Sons of Salem, Massachusetts, she weighed 350 tons and carried a well organized crew of 150 men and 20 guns. One of the most successful of the privateers, she eventually earned $600,000 in dividends for the owners and shareholders during the war (Paine, 1919, p. 129).

St. Lawrence, Webb, Master

Petitioner:	*Owners of the St. Lawrence*
Respondent:	*Owners of the America*
Citation:	*8 Cranch 434, 9 Cranch 121*
Lawyers:	*Daniel Webster, Mr. Irving, Mr. Pitman*
Started:	*June 20, 1813*
Decided:	*February 25, 1815*
Who Won:	*Owners of the America*
Decision:	*7–0*
Opinion:	*Justice Story*

On June 20, 1813, about one year after the official declaration of war, the *America* out of Portsmouth captured the *St. Lawrence*. The *St. Lawrence* was carrying a cargo from Liverpool to the United States with Silas Webb as the ship's master. The *St. Lawrence* had been owned by Robert Dickey of New York and Hugh Thompson of Baltimore. Two months earlier this ship had sailed from Sweden to Liverpool, England with a cargo of iron and other materials.

In May of 1813, the English agent for Dickey and Thompson sold the ship to a Liverpool firm with the contract subject to approval by the American owners. The Privy Council of Great Britain gave the ship a license to export to the United States, although the two countries were at war. The *America* brought the *St. Lawrence* into Portsmouth and court proceedings were started. The *St. Lawrence* and its cargo were auctioned on Wednesday, November 3, 1813, in Portsmouth.

Daniel Webster was hired by some of the owners of the *St. Lawrence* to appeal the case. One of the owners' arguments was that they had no knowledge of the declaration of war by the United States against Great Britain and therefore their cargo was not contraband. Other owners of cargo on board argued that the goods were not contraband because they were in payment of debts due before the war began or that the goods were purchased before the war and never shipped. The US Supreme Court decision was given on March 16, 1814 by Justice Livingston (8 Cranch 434). The Court affirmed the Portsmouth court's decision saying that eleven months was more than sufficient time to learn about the declaration of war. Some of the defendants were given additional time to furnish proof of their claims. Since no proof was ever furnished, their results were the same (9 Cranch 121, Justice Story).

Politicians and a College

The Controversy Begins

A few years later, Daniel Webster was more successful in arguing the next New Hampshire case before the Supreme Court. In the spring of 1815, John Wheelock, second president of Dartmouth College, wrote and distributed a pamphlet attacking the trustees of the college. He alleged that the trustees were using the college to establish a politico-religious hierarchy based on Federalism and Congregationalism. In addition, he asked the state legislature to investigate the situation. The trustees did not oppose the investigation.

Trustees of Dartmouth College
v.
Woodward

Petitioner:	*Trustees*
Respondent:	*William Woodward*
Citation:	*4 Wheaton 518*
Lawyers:	*Daniel Webster, Francis Hopkinson, John Holmes, William Wirt*
Started:	*Spring, 1815*
Decided:	*March, 1819*
Who Won:	*Trustees*
Decision:	*5–1 (3 opinions)*
Opinion:	*Chief Justice Marshall*

The trustees responded to Wheelock's charges by firing him and hiring a new president. Charges and counter-charges were made in private letters all over New England and in articles in local newspapers. By 1816 the future of Dartmouth College and Wheelock's allegations were among the major issues of the gubernatorial campaign.

William Plumer, a Republican who supported Wheelock, was elected governor. In his inaugural address he devoted considerable time to the Dartmouth question and gave recommendations to the legislature for action beyond their investigation. Plumer asked legislators to increase the number of trustees, to make the board no longer a self-perpetuating group, and to require the president to report annually to the New Hampshire Legislature. The justifications for his suggestions were that the college was for the public good, not the benefit of the trustees; that the college had requested the legislative investigation; and that the State had helped to support Dartmouth. From the time of King George III, whose representative in New Hampshire had issued the original charter to Dartmouth in 1769, to Plumer's time, this support from the colonial and later state governments had given Dartmouth three townships of land (the Dartmouth Grants), $900 in 1805 to end a deficit and $3,450 to build a medical school in 1809.

After intense political maneuvering on the part of both the Federalist and the Republicans, a law was passed establishing a new board of trustees and a board of overseers for Dartmouth University. Governor Plumer and the Executive Council quickly appointed people to fill the new positions and as one of the new trustees, Plumer called a meeting of the board. The new Dartmouth University was essentially a state university and the treasurer of the new board, William H. Woodward, possessed the old college charter, seal, records and account books.

What Happened to the Students?

While the politicians argued and maneuvered and the lawyers started various proceedings in the courts, the students had to choose sides. Most students selected sides based on their and their fathers' political beliefs. By the fall term of 1817, Dartmouth College under the old trustees had 95 students meeting in borrowed rooms in the village of Hanover, while Dartmouth University under the new trustees had fourteen students meeting in Dartmouth Hall. In November there was even a fracas over who would control the books of two literary societies. The university forces controlled the library but still broke into rooms in Dartmouth Hall which contained the other books. Awakened by the noise of an ax being used to break down a door, college students armed with sticks of firewood threatened the university students. No one was injured but the university boys were forced to leave under the crossed clubs of the college boys (Garraty, 1975, p. 24–25). Both the college and the university held graduation ceremonies.

The Courts Act

In 1815, John Wheelock had sent Daniel Webster $20 and asked him to be his lawyer at the time of the legislative investigation since Webster, a Dartmouth graduate, had previously agreed to give him professional assistance. Webster did not assist Wheelock, and by 1817 was advising the old trustees of Dartmouth College to sue Woodward to recover the items in his possession and to pay them $50,000 in damages.

The initial court proceeding should have been held in the western circuit court of New Hampshire, but the judge was none other than William Woodward, the person being sued by the college trustees. By agreement of lawyers on both sides, the case was transferred to the Superior Court (the highest court in the state). All of the justices of this court were Republicans appointed by Governor Plumer. The college trustees were represented by Jeremiah Smith, Jeremiah Mason, and Daniel Webster, while Judge Woodward was represented by George Sullivan and Ichabod Bartlett. The Superior Court decided in favor of Woodward and the university trustees.

Chief Justice Richardson gave the court's decision stating that it was against public policy to put control of institutions of higher learning in the hands of the few. He thus sided with the lawyers who claimed that the state legislature can regulate an institution that exists to provide education for the public. He cited the NH Constitution to support his opinion that "The education of the rising generation is a matter of the highest public concern, and is worthy of the best attention of every legislature" (1 NH 135). He reasoned that the King, in granting the original charter, did not have the power to limit the number of trustees forever, in the same way that a legislature does not have the power to control acts of future legislatures. Therefore, the contemporary New Hampshire Legislature was justified in changing the number of trustees to better meet the needs of the public.

Appeal to the US Supreme Court

The college trustees promptly appealed their case to the US Supreme Court. Daniel Webster and Francis Hopkinson argued for the plaintiffs, while the defendants were represented by John Holmes and William Wirt, US Attorney General. When the case was argued on March 10–12, 1818, Webster spoke for nearly five hours, ending with his famous emotional appeal, "It is, sir, as I have said, a small college, and yet there are those that love it" (Garraty, p. 27). The Supreme Court ended the session without issuing a decision.

Neither side in the controversy was willing to wait patiently for the Court's answer. Both started trying to pressure the judges they viewed as potentially undecided. For example, Daniel Webster furnished Judge Joseph Story with copies of the arguments used by the plaintiffs, partly to counteract the widely circulated copies of Chief Justice Richardson's New Hampshire decision. Meetings were held with Governor Clinton and Chancellor Kent in Albany, New York to convince them to influence Justice Livingston, with whom they had been associated.

Finally at the beginning of the March 1819 term of the US Supreme Court, Chief Justice John Marshall gave the court's decision. By a vote of 5 to 1, the Court reversed the NH Superior Court's decision and supported the college trustees. Marshall found that the college charter was a contract and that the college was a private, not a public, corporation. The contract clause of the US Constitution therefore prevented the State from changing the charter granted in 1769. Judge Story's concurring opinion suggested that state legislatures could keep the power to change charters by including clauses in the original charter that reserved that power to the legislature.

Why these Cases Matter Today

Dartmouth College v. Woodward was important because Judge Marshall's decision gave private corporations protection from state intervention. This encouraged the development of the nation's economy as well as private organizations for social activities. These goals remain significant in our economic and social spheres today.

Although privateers were outlawed by international agreement in the nineteenth century, the *St. Lawrence* and *Susannah* cases helped establish the authority of the US Supreme Court and its ability to arbitrate admiralty cases. Article III of the constitution grants this authority, but as we have seen with conditions under the Articles of Confederation, court decisions which are enforced by the other branches of government are sometimes necessary to give support to the meaning of the written words.

Carpetbaggers, Speculators and Investors

When the US Constitution was written, some people feared that the proposed national government would be too powerful, that it would take away the sovereign powers of the individual states. With the decision of the court in *Chisholm v. Georgia* (2 US 419) in 1793, it seemed that these fears were all too real. This case upheld the right of a citizen of one State to sue another State in an original action in the Supreme Court. Congress quickly moved to reverse the court's action by passing the Eleventh Amendment. How would this amendment be seen by the court in the aftermath of the Civil War?

The Eleventh Amendment

Louisiana
v.
Jumel

Petitioner:	*John Elliott, Nicholas Gwynn, Harry S. Walker*
Respondent:	*Allen Jumel*
Citation:	*107 US 711*
Lawyers:	*Wheeler H. Peckham, John A.Campbell*
Started:	*January 16, 1880*
Decided:	*October 1882*
Who won:	*Jumel*
Decision:	*7–2*
Opinion:	*Chief Justice Waite*

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States … to controversies between two or more states; between a State and citizens of another State …

In … cases … in which a State shall be a party, the Supreme Court shall have original jurisdiction." *Article III Section 2 US Constitution*

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." *Amendment XI US Constitution*

At the end of the Civil War, the states of the former Confederacy were in ruins. Louisiana was no exception. The states, during Reconstruction, were undergoing major changes in their governments. Louisiana amended its State constitution in 1874.

Part of the operations of any State government is raising money through borrowing, which states typically do by selling bonds. At the same time it was amending its constitution it also enacted "Act No. 3 of 1874," which issued bonds to be paid in 40 years. The bonds would pay seven percent interest each year. These bonds were to be paid with a statewide property tax on all land and personal property in the state. These bonds were to be used to buy the outstanding old bonds of the state. But those bondholders would only get 60 cents for every dollar they were owed.

After the Civil War, much of the wealth of the United States was in the northern states, as war had devastated the economy of the South and simultaneously enriched many Northern manufacturers. John Elliott, Nicholas Gwynn, and Henry S. Walker were citizens of New Hampshire who purchased $20,000 worth of Louisiana bonds. At the time it probably appeared to be a good investment.

The investors/speculators did not reckon, however, with the politics of Louisiana. The citizens of that state, anxious to rid themselves of all vestiges of Reconstruction, and free to do so after the election of 1876, drafted a new constitution which took effect on January 1, 1880. That constitution changed the interest rate on all existing bonds to two percent for the next five years, three percent for the next 15 years and four percent after that. Bondholders, at their option, could exchange their bonds for new bonds which would pay four percent, *but* (there's always a catch) they would only get 75 cents on the dollar for their old bonds.

Elliott, Gwynn, and Walker demanded payment on their old bonds from the State treasurer. He, of course, refused, since Louisiana had made it a crime for a State official to pay out money on the old bonds, in violation of the law. Elliott, Gwynn, and Walker brought suit in federal court in Louisiana and also in the Louisiana State Courts.

The investors/speculators argued that they had a contract with the State of Louisiana; that is, they paid $20,000 in exchange for the State's promise to pay them seven percent interest for the next 40 years. The new constitution violated that contract by changing the interest rate and that, they contended, violated the US Constitution. Article 1 Section 10 prohibits the states from enacting any laws which impair contracts. It would appear that the New Hampshire investors had the law on their side. There was, however, a technicality that got in the way: the Eleventh Amendment.

More Background

When the US Constitution was ratified in 1789, Article III, the part of the Constitution that creates the judicial system, provided that the federal courts would deal with cases between states and "between a State and citizens of another State." In 1792, Alexander Chisolm brought a contract suit against the State of Georgia. Despite objections from Georgia, the US Supreme Court held that the Constitution was clear – citizens of one State had a right to be heard in the federal courts if they had a claim against another state. At about the time that the Court gave its decision, another case was brought against Massachusetts where a summons was served on its governor, John Hancock. This led to the convening of the Massachusetts Legislature which instructed its senators and representatives to seek the adoption of an amendment to "remove any clause or articles of said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States." Other states felt the same and the Eleventh Amendment was proposed and ratified in 1798. No longer was there any right of a citizen to sue another State in federal court.

Elliott, Gwynn, and Walker (through their lawyers) knew all this and didn't try to sue Louisiana in federal court. Instead they sued the State Treasurer, the State Auditor, the Governor, the Lieutenant-Governor, the Secretary of State, the Speaker of the House of Representatives, and the State National Bank of New Orleans, which was the fiscal agent for Louisiana. They asked the federal court for a writ of *mandamus,* which is an order that compels government officials to carry out an official duty. The federal court refused to issue the writ, deciding that the State officials, because of the constitutional changes, had no authority to pay the interest on the bonds; in fact, they were clearly prohibited from doing so.

The US Supreme Court agreed that Louisiana had entered into a contract with all the bondholders in 1874. The state, in exchange for the purchase of the bonds, agreed to collect the property tax, set it aside for repayment of the bonds, and to pay the interest on the bonds. It was also clear to the Court that the new State constitution expressly intended to break that contract.

Sovereign Immunity

The Court, however, recognized that Louisiana, despite its blatant attempt to back out of its obligations, was cloaked in sovereign immunity. This concept, bequeathed to American law by English law (where much of our legal heritage comes from), states simply that the sovereign, originally the King or Queen and now the State or federal government, cannot be sued in court without his, her, or its consent. In other words, if the King didn't want to be sued for running someone over with his carriage, the victim had no right to go to court. The concept was transferred here, with the government substituting for the monarch. The Eleventh Amendment put the concept into the US Constitution.

Therefore, in 1882, the Court examined the attempt by Elliott, Gwynn, and Walker to get around sovereign immunity and decided that suing the State officials would not work. No matter how they disguised it, the bondholders were suing the State of Louisiana, something they could not legally do.

New Hampshire Legislature to the Rescue

New Hampshire
v.
Louisiana

Petitioner:	*New Hampshire*
Respondent:	*Louisiana*
Citation:	*108 US 76*
Lawyers:	*Wheeler H. Peckham, J.C. Egan*
Started:	*July 18, 1879*
Decided:	*March 5, 1883*
Who won:	*Louisiana*
Decision :	*9–0*
Opinion:	*Chief Justice Waite*

Elliott, Gwynn, and Walker were not about to give up their $20,000 (plus interest) without another fight. No doubt men of some means, they contacted their state legislators for help. The New Hampshire Legislature responded by passing "An Act to protect the rights of citizens of this state, holding claims against other states." This law stated that when any citizen of New Hampshire held a written obligation from another State and that State did not pay it, the citizen could assign his rights to that obligation to the State of New Hampshire. The New Hampshire Attorney General would then, after the citizen had paid all necessary costs for the suit, bring a lawsuit in the name of the State of New Hampshire in the US Supreme Court. Any money collected would then be paid to the citizen, who also had the right to decide whether or not to accept a compromise of the claim.

This law brought the offending State into the only court that could hear cases against states – the US Supreme Court. The Constitution gives the US Supreme Court original jurisdiction over cases between states. This is the court where the case is filed and where it is tried. The US Supreme Court usually only hears appeals of cases tried in lower courts, but disputes between states begin and end in the nation's highest court. Those disputes usually involve questions of boundaries between states or issues of taxation of a neighboring state's citizens. *See Border Disputes, beginning on page 17.*

Unfortunately for Elliott, Gwynn, and Walker, Chief Justice Waite made short work of the New Hampshire Legislature's attempt to help out its beleaguered investors/speculators. The Chief Justice, being observant, noticed that the lawyer arguing for New Hampshire was none other than Wheeler H. Peckham, who had argued *Louisiana v. Jumel* for Elliott, Gwynn, and Walker so recently. He also noted that the New Hampshire citizen investors were the ones putting up all the costs of the litigation, that they retained the right to settle the case (not the Attorney General), and that, essentially, the State of New Hampshire had no financial interest in the outcome of the case. To the Chief Justice, it was clear that the intent of the Eleventh Amendment was to prohibit suits against the states in the federal courts. It was clear that this was merely an attempt to get around that prohibition, and he would not have any part of that. "... in our opinion, one State cannot create a controversy with another State ... ."

Elliott, Gwynn, and Walker took a chance on some attractive bonds issued by the State of Louisiana. It was speculation that didn't pan out.

Why these Cases Matter Today

The Eleventh Amendment gives the states immunity against being sued in the federal courts unless they consent. These cases established that citizens could not get around that prohibition by suing the State officials or by using their own State as a stand-in.

Border Disputes

Each State under the Articles of Confederation retained almost complete independence. Each could coin money, control trade into and out of the state, and choose to disregard treaties signed by the central government. If a dispute arose between two states, there was no mechanism to resolve the dispute. Clearly this situation led to economic chaos and festering disagreements. Something had to change, and change came with the ratification of the US Constitution.

Original Jurisdiction for Boundaries

The most basic dispute between states is over the location of a mutual boundary. Giving original jurisdiction (the power to initially hear a lawsuit) to the US Supreme Court, was a way to insure fairness in settling these disputes. This power was delegated to the Court in Article III of the US Constitution. It was assumed that the courts of one State might favor the government of that State if asked to settle a dispute. In contrast, the justices of the US Supreme Court would hear each State fully and make a just decision based on the laws and Constitution.

As the work of the court has grown, methods have been developed to facilitate and speed the work. For many years, the court has appointed a special master in cases involving boundary disputes between states. The special master is often a former judge who is given the authority to discover all the relevant facts and recommend a result to the court. New Hampshire has been a party to two such disputes; each time the procedure included the appointment of a special master. These people had a large job to do just to determine the facts, since in both cases, the boundary in dispute had been established by the King of England when New Hampshire was still a colony. The masters had to research what the king's orders meant at the time and how they had been interpreted from the eighteenth to the twentieth centuries.

Vermont v. New Hampshire

The State of Vermont brought a suit against the State of New Hampshire on December 18, 1915, to determine their mutual boundary. At least one of the reasons for the suit was the assertion by New Hampshire, beginning in 1909, that it could tax buildings or structures on the west side of the Connecticut River. Between 1909 and 1927, New Hampshire taxed bridges and dams that extended across the river. At the same time, Vermont was taxing some of the same structures or at least parts of them, for example, the western end of a bridge and its abutment. (One wonders what the owners of these properties did.)

Numerous amendments to the original documents submitted to the court were made and finally on October 13, 1930, a special master was appointed, Edmund F. Trabue, Esquire, of Kentucky. Mr. Trabue spent the next two and one-half years investigating and developing recommendations. Because New Hampshire did not accept his recommendations, the case was argued before the US Supreme Court on April 20 and 21, 1933. Justice Harlan Fiske Stone gave the decision on May 29, 1933. (289 US 593)

State of Vermont
v.
State of New Hampshire

Petitioner: State of Vermont
Respondent: State of New Hampshire
Citation: 289 US 593
Lawyers: Warren R. Austin,
Lawrence C. Jones,
Warren R. Austin, Jr.
Charles E. Hughes, Jr.,
Francis W. Johnston,
Jeremy R. Waldron,
John Fletcher Caskey,
Charles A. Wallace
Started: December 18, 1915
Decided: May 29, 1933
Who Won: New Hampshire
Decision: 8–0
Opinion: Justice Stone

Mr. Trabue had many options for determining the location of the boundary. Both sides at various times argued for one or more of these options: the geographic middle of the river, the low water mark on the west side, the low water mark at the average height of water, the high water mark on the west side, the top of the bank on the west side where the vegetation ends and the thread of the channel. Based on his report, the Court considered the history going back to the appointment of Benning Wentworth as Governor of New Hampshire by King George II in 1741 and to the grant by King Charles II of the Province of New York in 1674. Working forward to 1933, the Court determined that the boundary is the low water mark on the western side of the river, defined as the "line drawn at the point to which the river recedes at its lowest stage without reference to extreme droughts" (289 US 620).

Subsequently, a special commissioner was appointed to locate and mark this boundary permanently. Samuel S. Gannett was given this responsibility and his report was sent to the court in 1936. Monuments are set on the west bank above the high water mark to protect them during floods. Each is of light gray granite with a bronze tablet sunk in the top. A total of 103 markers was set up with two points having to be remarked after the Flood of 1936. (Professor Jere Daniell of Dartmouth College said that Vermont out-taxed New Hampshire on this case. After all, now New Hampshire has to pay for 90% of the bridge!)

Opinion and Dissent: The Boundary with Maine

While all the justices agreed with the resolution of this dispute between Vermont and New Hampshire, such unanimity was not reached when Maine and New Hampshire tried to solve their boundary dispute in the 1970s. Again the original description of the boundary came from a decree of King George II in 1740, and the disagreement was over the location of certain points. The dispute started over lobster fishing because Maine's laws were more restrictive than those of New Hampshire; only Maine residents could obtain the necessary license and Maine had stricter size requirements.

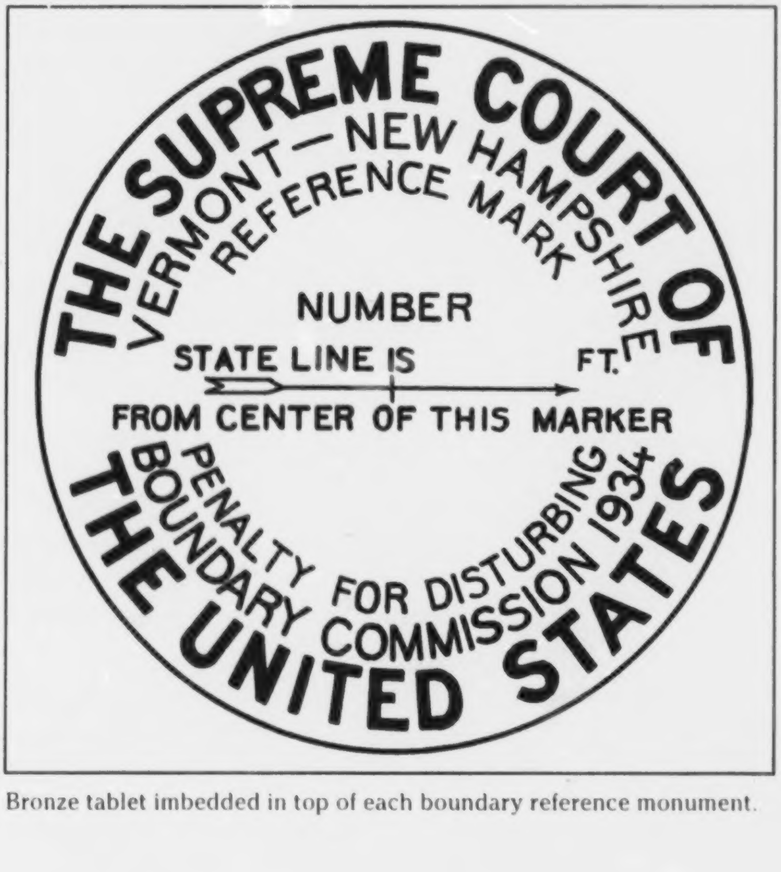
State of New Hampshire
v.
State of Maine

Petitioner:	*State of New Hampshire*
Respondent:	*State of Maine*
Citation:	*426 US 363*
Lawyers:	*Richard F. Upton,* *Warren B. Rudman,* *David H. Souter,* *Edward F. Bradley, Jr.,* *Joseph E. Brennan,* *Donald G. Alexander,* *Robert J. Stolt*
Started:	*1973*
Decided:	*June 14, 1976*
Who Won:	*Mutual agreement*
Decision:	*6–3*
Opinion:	*Justice Brennan*

A Special Master, retired Supreme Court Justice Tom C. Clark, was appointed, and the facts were researched. The two states reached a mutually acceptable agreement which located the boundary at the middle of the main channel of navigation in the river, and the boundary in the ocean as a straight line between the points at which the main navigation channels cross the closing lines of Portsmouth and Gosport Harbors. A majority of the justices in an opinion written by Justice Brennan said that this agreement was satisfactory. The dissent written by Justice White said that the Court should not just accept it because the two sides agreed; the court should determine the boundary based on legal principles. These principles conformed to the recommendations of the Special Master that the boundary should be the geographic middle of the river.

Why these Cases Matter Today

Although border disputes between states are not common, a means of resolving such disputes remains an important part of our federal system. Without a way to solve them, the states might return to the bickering and exclusivity experienced under the Articles of Confederation. Article III of the Constitution, by giving original jurisdiction to the US Supreme Court, has helped the United States overcome the divisions between states and grow as a nation.


THE SUPREME COURT OF
VERMONT—NEW HAMPSHIRE
REFERENCE MARK
NUMBER
STATE LINE IS FT.
FROM CENTER OF THIS MARKER
PENALTY FOR DISTURBING
BOUNDARY COMMISSION 1934
THE UNITED STATES

Bronze tablet imbedded in top of each boundary reference monument.

Citizens of Other States

One of the problems faced by the authors of the US Constitution was how to prevent states from unfairly favoring the citizens of that state. If one nation was to be created from thirteen quarreling entities, each State would have to give legal recognition to the citizens of other states in matters such as rights and protections in court, honoring debts, and conducting business. Article IV describes how states relate to each other. Section 1 requires states to honor the laws, records and court proceedings of other states. Section 2 says that citizens of one State (State A) are entitled to the same treatment as the citizens of another (State B) when they are in the other State (State B). It also provides for the return of fugitives from justice.

Full Faith and Credit

If the courts of one State have jurisdiction over a particular issue and follow due process and make a final determination of the issue, other states must recognize that judgment as if it had been made in any of the other states. To do otherwise would allow people to move from State to State to avoid their creditors.

Renaud
v.
Abbott

Petitioner:	*William H. Renaud*
Respondent:	*J.S. Abbot(t)*
Citation:	*116 US 277*
Lawyers:	*Mr. Maury, Thomas J. Semmes and Robert Mott, Samuel C. Eastman*
Started:	*January 1866*
Decided:	*Filed January 4, 1886*
Who Won:	*Renaud*
Decision:	*9–0*
Opinion:	*Justice Matthews*

The J.S. & E.A. Abbot and Company was formed in 1847 in Concord, New Hampshire, when the Abbot–Downing Company dissolved. The Abbots continued to make Concord coaches for sale as well as horse-drawn freight wagons, baggage wagons, ambulances, buggies and other types of vehicles. These were shipped throughout the United States, to Mexico and South American countries.

In January 1866, the Abbots sued Frank Borge in the Third District Court of New Orleans, Louisiana, for payment of notes made by J.L Wilbur & Borge. They sued for $3,200. In May of that year

Borge counter-sued for $23,383.64 plus interest. By September of that year, J.L. Wilbur intervened and adopted Borge's suit, having been appointed as syndic or the person representing creditors in a bankruptcy. Wilbur sued the Abbots later that same year in the Fifth District Court of New Orleans and the sheriff reported that he had delivered a citation to one of the Abbots. In January 1867, none of the Abbots showed up at the trial and a judgment by default was made in favor of Wilbur. When the Third District Court case was heard, the Abbots' attorney was successful in getting the countersuit thrown out by saying it was the same suit as the one already decided in the Fifth District Court. The Abbots then sued to have the Fifth District Court's judgement annulled because they had not been properly notified. The Louisiana Supreme Court (22 La. An. 368) affirmed the judgment against the Abbots in 1870.

By 1878, the case was before the NH Supreme Court, as Wilbur had tried to have the judgment enforced by the New Hampshire courts. The NH Supreme Court said the Fifth District Court of New Orleans had no jurisdiction over the Abbots. The case again appeared before the New Hampshire Court in 1880 when the court ruled that while the judgment may have been valid in Louisiana, it wasn't in New Hampshire and that the US Constitution and laws didn't give Wilbur any more rights here than he would have had if the case had started here. This ruling provided grounds for an appeal to the US Supreme Court. Meanwhile, Wilbur died and William H. Renaud was appointed to take his place. The opinion of the US Supreme Court written by Justice Matthews reversed and remanded the New Hampshire court's opinion. They said that New Hampshire had to recognize the validity of the Louisiana Court's actions under Article IV, Section 1 of the US Constitution.

An Electric Company and the Death of an Employee

Leon Clapper, a resident of Vermont, was employed as a lineman by the Bradford Electric Company, Inc. also located in Vermont. He was employed to perform emergency service in both New Hampshire and Vermont as the company had lines extending into New Hampshire. Mr. Clapper was sent to replace burned-out fuses in a substation in New Hampshire and died while doing this job. Vermont law did not permit Mr. Clapper's heirs to sue for damages as he was covered by the state's Workmen's Compensation Act. New Hampshire law permitted such suits. Jennie Clapper was the administrator of Leon's estate and sued under New Hampshire law to recover for his wrongful death. On the grounds of diversity jurisdiction, the case was transferred to the federal courts. The case was tried three times before a jury, with Ms. Clapper being awarded $4,000, which the Electric Company appealed. The US Supreme Court granted a writ of *certiorari* and heard the case in February of 1932. They decided that the relationship between Mr. Clapper and the company was created by the laws of Vermont and that therefore Ms. Clapper had no grounds to sue in New Hampshire. Courts in New Hampshire, including the US District Court, had to give full faith and credit to the Vermont law governing the situation. Therefore, the company did not have to pay Ms. Clapper the $4,000.

Bradford Electric Co., Inc.
v.
Clapper

Petitioner:	*Bradford Electric Company*
Respondent:	*Jennie Clapper*
Citation:	*116 US 145*
Lawyers:	*Stanley M. Burns, George T. Hughes, William E. Leahy, Robert W. Upton, John E. Benton*
Started:	*Unknown*
Decided:	*May 16, 1932*
Who Won:	*Bradford Electric Company*
Decision:	*7–1–0*
Opinion:	*Justice Brandeis*

Privileges and Immunities

Section 2 of Article IV states that citizens of one State are entitled to the privileges and immunities given citizens in other states. In other words, if laws of one State permit 15-year-old females to marry, a 15-year-old girl from another State could go there and get married after meeting any other requirements. The next two cases are about non-residents of New Hampshire and this state's laws and rules.

Lawyers and Residency Requirements

In 1979, Kathryn Piper applied to take the New Hampshire Bar Exam, a prerequisite for being an attorney in the state.. As a resident of Lower Waterford, Vermont, she also submitted a form showing her intent to become a resident of New Hampshire and was allowed to take the exam, which she passed. The Board of Bar Examiners told her she would have to establish a New Hampshire home address before she could be sworn in. In 1980, Ms. Piper requested a dispensation from the residency requirement on the basis that her home was only about 400 yards from the State line, she and her husband had just become parents and the mortgage on their Vermont home had a very good interest rate. Her request and a subsequent petition to the state's Supreme Court were denied.

Supreme Court of New Hampshire
v.
Kathryn A. Piper

Petitioner:	*New Hampshire Supreme Court*
Respondent:	*Kathryn A. Piper*
Citation:	*470 US 274*
Lawyers:	*Martin L. Gross, Jon Meyer*
Started:	*May 1980*
Decided:	*March 4, 1985*
Who Won:	*Kathryn Piper*
Decision:	*7–1–1*
Opinion:	*Justice Powell*

Ms. Piper sued the NH Supreme Court, its justices and clerk in US District Court for the District of New Hampshire. She said that to forbid lawyers to live in other states was a violation of the US Constitution. The District Court agreed with her; the Circuit Court was evenly divided, which resulted in upholding the District Court. The NH Supreme Court then appealed to the US Supreme Court.

Justice Powell's opinion affirming the lower federal courts states that Article IV, Section 2 of the US Constitution was intended to create a national economic union. While states may have different fees for non-residents and residents when something involving recreational activities such as a hunting license is concerned, they may not deny lawyers the right to earn a living within a State solely on the basis of where they live.

The NH Supreme Court had argued that non-residents should not be admitted to the Bar because they are less likely to:

1. be familiar with local rules and procedures
2. behave ethically
3. be available for court proceedings
4. provide *pro bono* service.

The US Supreme Court replied that lawyers living outside New Hampshire are unlikely to take the exam and pay the annual dues of $125 unless they expect to do a lot of work in New Hampshire and therefore they would become familiar with the local rules. If lawyers, regardless of residence, are dishonest, the State court may discipline them. The courts may, if necessary, require lawyers living far away to retain a local lawyer to handle unscheduled meetings and hearings in order to prevent delays. The final response was that the New Hampshire court could require all attorneys to represent indigents, etc. Today, lawyers do not have to live in New Hampshire to be members of the New Hampshire Bar Association.

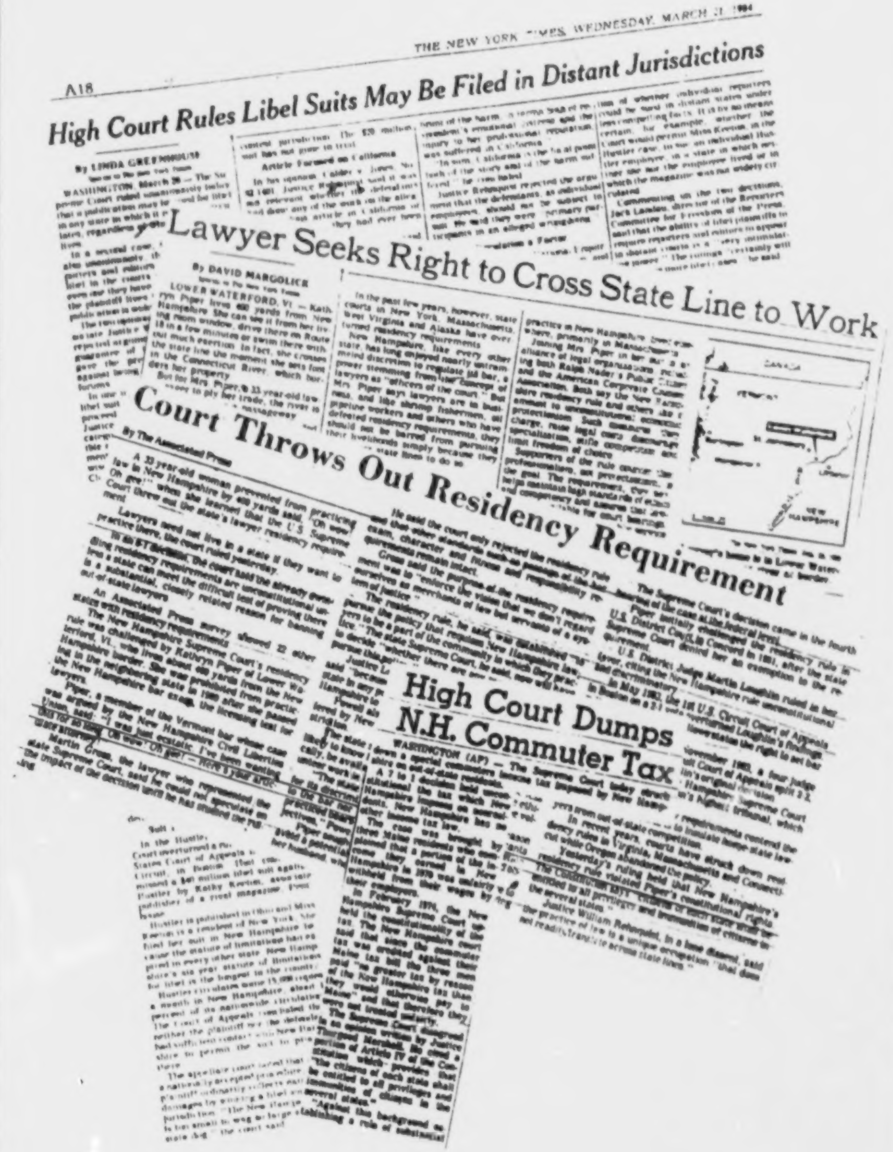
Commuter Taxes

May the state legislature pass a law that in effect requires people working in New Hampshire to pay taxes on their income only if they live in another state? That was the question that Carl M. Austin and other Maine residents asked the US Supreme Court to answer in 1975. The New Hampshire Legislature passed a law in 1971 that taxed the income of commuters at the rate of 4 percent after an exemption on the first $2000 earned each year. At the end of each year, if the employees could show that their home State would tax at less than 4 percent, the New Hampshire tax would be reduced to the lower amount. Throughout the year however, employers were required to withhold the tax from the employees' paychecks.

Carl A. Austin et. al.
v.
State of New Hampshire et. al.

Petitioner: *Carl A. Austin and other Maine Residents*
Respondent: *State of New Hampshire*
Citation: *420 US 656*
Lawyers: *Charles W. Smith, Charles G. Cleaveland*
Started: *1974*
Decided: *March 19, 1975*
Who Won: *Carl Austin, et. al.*
Decision: *7–1*
Opinion: *Justice Marshall*

Additional provisions of the law made the tax not applicable to people who lived in New Hampshire and worked in other states. Also unaffected by the tax were residents of New Hampshire who worked in New Hampshire. The only people who had to pay the tax were those who commuted here to work and who were not represented in the legislature. The US Supreme Court, in an opinion by Justice Marshall, ruled that the tax was unconstitutional since it treated non-residents unfairly.



THE NEW YORK TIMES, WEDNESDAY, MARCH 21, 1984

A18

High Court Rules Libel Suits May Be Filed in Distant Jurisdictions

By LINDA GREENHOUSE

Lawyer Seeks Right to Cross State Line to Work

By DAVID MARGOLICK

LOWER WATERFORD, Vt.

Court Throws Out Residency Requirement

By The Associated Press

High Court Dumps N.H. Commuter Tax

WASHINGTON (AP)

New York Times, January 28, 1985, p. 8. March 21, 1984, p. 1. *Concord Monitor*, March 5. 1985. p. 4. *Manchester Union Leader*, March 19, 1975, p. 1

BEST COPY AVAILABLE

Kathy Keeton and Hustler Magazine

Kathy Keeton
v.
Hustler Magazine, Inc. et. al.

Petitioner: Kathy Keeton
Respondent: HUSTLER
Citation: 465 US 770
Lawyers: Norman R. Grutman, Jeffrey Darchman
On the brief: Lea Bulmayer, David Kahn, Henry Monaghan
Started: September 1975
Decided: March 20, 1984
Who Won: Keeton
Decision: 8–1–0
Opinion: Justice Rehnquist

What happens when potentially all states are involved in a lawsuit? If persons feel libeled (having something printed about them that injures their reputations) by a national publication, they could potentially have to sue the magazine or newspaper in each and every state's courts. This would be onerous for both sides. To prevent this, federal courts may utilize what is called the "single publication rule," meaning that if a person wins a libel suit in one state, damages can be given based on the damages caused in all states.

Diversity jurisdiction means that a federal court may hear a case that involves state law if the two parties are citizens of different states. What if one of the parties is not an individual but a corporation? In what State does a corporation reside? The courts have ruled that a corporation is considered a citizen of the State in which it is incorporated and keeps its principal place of business.

Each State has laws that differ about what is called the statute of limitations. This means the length of time that a crime may be prosecuted or a civil wrong can be subject to a lawsuit. For example, if a person fails to stop for a red light while driving, the police cannot wait ten years before writing a ticket. This would violate the statute of limitations for this offense. In 1980, New Hampshire had the longest statute of limitations, six years, for libel.

In that year Kathy Keeton, a resident of New York, sued Hustler Magazine, a corporation based in Ohio, for libel in five issues of the magazine published between September 1975 and May 1976. Keeton had previously tried to sue in Ohio but was denied because that state's statute of limitations had already expired. Keeton's suit was filed in US District Court in New Hampshire due to New Hampshire's longer statute of limitations. Keeton's only connection to New Hampshire was that a magazine for which she worked was circulated in the state; Hustler's only connection was the 10,000 to 15,000 copies of the magazine sold in the State each month. Keeton's suit in New Hampshire was for damages suffered in all states.

After dismissal of the suit by the District and Circuit Courts, Keeton appealed to the US Supreme Court. In 1984 Justice Rehnquist delivered the court's opinion (465 US 770). It said that because Hustler circulates its magazines in New Hampshire, it can be sued there. New Hampshire has an interest in redressing injuries that occur within the state. Publication of false statements of fact injure both the subject of the libel and the readers who may be deceived. Therefore, the US District Court in New Hampshire does have jurisdiction in this case and Keeton's suit should not have been dismissed. The case was reversed and remanded.

Why these Cases Matter Today

Article IV of the US Constitution protects all citizens from being treated unfairly by the courts of states in which they are not residents and gives them a sound basis for conducting business across State lines. It means that if you go to Maine and are arrested, the Maine courts must treat you just as if you were a citizen of Maine. It also means that if someone who lives in Vermont owes you money, there is a mechanism for you to collect what is rightfully owed to you. It does not, however, mean that you won't have to pay a higher out-of-state fee for something like a hunting license in Montana.

The Work of the Court

Many cases heard by the court in the nineteenth century would today never be considered. That is because in its earliest years the court accepted any and all cases that reached it by any of several different methods. Due to changing laws, today's court has control over its caseload and is very selective. This chapter has an explanation of the procedural changes at the court, followed by three cases typical of those no longer heard.

Original Jurisdiction

The US Supreme Court, like any other court, may only hear cases that are within its power or jurisdiction. Original jurisdiction, meaning the first court to hear a case, is granted by Article III of the US Constitution. The US Supreme Court is specifically authorized to hear cases of controversy between two or more states such as those between New Hampshire and Maine or Vermont and New Hampshire, and to hear cases that involve ambassadors or other foreign officials. These cases make up a very small portion of the Court's cases. In cases between states, the Court usually appoints a special master who acts as a trial judge. The US Supreme Court acts as an appeals court, issuing the final opinion. Any changes in original jurisdiction would require a constitutional amendment.

Appellate Jurisdiction

The great majority of its cases fall within the appellate jurisdiction of the Court. Because this authority is granted by the US Congress it has varied over time. The Judiciary Act of 1789 set up the first rules for appeals to the Court, the number of justices (six at that time with several changes until today's number of nine), lower federal courts, and methods of appeals such as writs of error from each state's highest court. Although an opportunity existed to make history, early Presidents found it difficult to obtain qualified candidates for the Court as it had little prestige and few cases. Early justices were also required by the Judiciary Act of 1789 to "ride circuit" or go to a specific area of the country where each acted as a court of appeals for the lower district courts. This was a tremendous burden at a time when transportation was by horseback and some circuits required a justice to ride 1,800 or 1,900 miles to hear cases within the designated area between terms of the Court

(Schwartz, 1993, p. 18). At this time the US Supreme Court heard all cases that were appealed to the Court regardless of the merits of the cases.

Changes came slowly with a number of new laws passed by Congress. In 1869, retirement pay became available to justices for the first time for those who wished to leave their lifetime appointments. In 1891, the practice of riding circuits was finally abolished after years of complaint by the justices. Finally the Judiciary Act of 1925 gave the justices control over most of their workload for the first time, rejecting the idea that they could or should hear every single case. Today most cases heard by the Court are those in which four of the nine justices have voted to grant a writ of certiorari. Each year the justices will hear only about 5 percent of the approximately 5,000 cases for which writs of *certiorari* are submitted.

Paperwork Comes First

Cert. denied is the phrase petitioners to the Court dread. This means the justices have refused the case. *Cert. granted* means it will be heard. A date is set for oral arguments either during the current term of the Court (a term usually runs from October to June) or early in the next term. Before that occurs, lawyers on each side must submit a brief to the Court. Until 1821, this was not required so the early justices might have had no prior knowledge of the case until the lawyers started their oral arguments. From 1821 until early in the twentieth century there were no limits on the size of briefs. Of course some lawyers thought more was better, and some briefs exceeded 1,000 pages. Today there is a limit of 50 pages and strict rules about the mechanics such as color coding, size of margins, etc.

Only persons with standing are entitled to appear before the Court. This means usually that only the two sides involved in an actual dispute are represented in court. Individuals or organizations with an interest in a particular case may file a brief as an *amicus curiae*, or friend of the court, under some circumstances. Both sides must agree or the potential *amicus curiae* must petition the Court for permission. For example, in a case that concerns substantial changes to the administration of national parks, the Sierra Club might be an *amicus curiae*.

Oral Arguments

The justices have read the briefs and are ready to hear lawyers on each side. These lawyers must have been admitted to the Bar of the US Supreme Court according to the Court's rules of the time. From 1789 until about the Civil War, lawyers who practiced before the US Supreme Court were given an unlimited amount of time for oral arguments. In some cases, they spoke literally for days; some of them would speak without interruption for five or more hours! To make the work of the Court more efficient, today each side is limited to 30 minutes unless a special exception is made. Any of the justices may interrupt the lawyers at any time to ask questions, comment, etc. The justices will normally try to make the lawyers focus on issues they see as important. Once the 30 minutes is over, a red light on the lawyer's podium goes on and the lawyer must stop talking.

Opinions

In the early years of the court, each justice read an individual opinion for each and every case. This is referred to as giving opinions *seriatim* and it was strongly supported by many people including Thomas Jefferson. When John Marshall became the Chief Justice, he believed the Court's voice would be more effective if they spoke as one or at least as majority/minority groups. Consequently he ended the practice of delivering *seriatim* opinions.

Today any length of time may occur between the oral arguments and the delivery of the opinion or opinions. Whenever possible, decisions are issued during the same term as the case was heard. If all the justices in their private conference (held after oral arguments) agree on the decision, the Chief Justice will pick the person to write the opinion. If it is a very important case such as *Brown v. Board of Education* on school desegregation, the opinion may be written by the Chief with all the justices concurring. In the many instances when not all nine agree, the Chief Justice determines the author if in the majority. If not, the most senior justice in the majority makes the decision. The most senior member of the minority likewise assigns a justice to write the dissenting opinion. Draft opinions are circulated among the justices enabling everyone to comment and make suggestions. Once the justices are satisfied, the opinions are printed and are announced briefly from the bench. Opinions are no longer read aloud during court time in the interests of efficiency.

Per curiam (by the court) opinions are unsigned and usually are brief. They often reverse lower court decisions in circumstances where the Court sees the issue as routine or where they think compliance to already established rulings should be obvious.

Advice

The decision was made early in our country's history, during President Washington's term of office, that the US Supreme Court would not issue advisory opinions to either the President or Congress. In effect, the Court told the other two branches to take action and they would hear cases that arose from those decisions. This is *not* true for the highest State Courts; NH's Supreme Court, for example, does give advisory opinions prior to the passage of a law or an action by the Executive Branch.

The US Supreme Court does, however, give advice on questions of law, not of fact, to lower federal courts. Any of the eleven Courts of Appeal in the country may send a certification of question to the US Supreme Court. The US Supreme Court ruling is then binding on the lower court. This procedure is restricted to courts; individual lawyers may not use it as an alternative to a writ of *certiorari.*

Law Clerks

When the US Supreme Court was established, each justice was expected to do his own research, writing, etc. As the workload increased over the years, justices looked for ways to obtain some assistance. Beginning in 1882, some began hiring recent law school graduates to be support staff. Originally these justices personally paid the salaries of their law clerks. In 1922 Congress appropriated money for each justice to hire one clerk. Today each justice may hire four law clerks, two secretaries and one messenger. Usually the law clerks are recent graduates of prestigious law schools who have graduated at the top of their class and have clerked in a lower federal court for at least a year. Many remain in their positions for only one year and then move to jobs either in private law firms or as lawyers hired by the government. Their responsibilities include reviewing records, researching questions of law, summarizing petitions, assisting in the preparation of opinions and whatever else the individual justice may require of them.

Is Hart's Location a Monument?

Because the US Supreme Court had to accept all appeals in the nineteenth century, it considered cases on all kinds of topics that it would not hear today. For example, in the 1880 term of the Court, the justices deliberated on a disagreement over the ownership of about 8,000 acres of land in New Hampshire. The parties to the disagreement were the Bartlett Land and Lumber Company and Mr. Saunders.

Land Company
v.
Saunders

Petitioner:	*Bartlett Land and Lumber Co.*
Respondent:	*Saunders*
Citation:	*103 US 316*
Lawyers:	*William L. Putnam & Ossian Ray, Josiah G. Abbott*
Started:	*November 1831*
Decided:	*October term, 1880*
Who Won:	*Saunders*
Decision:	*9–0*
Opinion:	*Justice Bradley*

Governor John Wentworth had granted a township, which came to be known as Hart's Location, to Thomas Chadbourne on April 27, 1772. The grant included a description of the boundaries. As part of a survey of New Hampshire in 1803 conducted by the state, Mr. Merrill made a map of Hart's Location again showing distinct boundaries. The existence of Hart's Location was further proven in court by its inclusion in the State census, the state's tax rates and its inclusion in districts for representatives to the State legislature.

On August 31, 1830, Abner Kelley was treasurer for the State of New Hampshire. In his official capacity he deeded, to Jasper Elkins and others, land extending from the northeast corner of Lincoln to Hart's Location and then to the northwest corner of the Town of Burton (now the Town of Albany). This land was wild and mountainous and seen as having little value. It was assessed for $800 for an area of 70 or 80 square miles. Mr. Elkins and his fellow grantees had a survey conducted to locate the boundary. The officials and landowners of Hart's Location were not consulted about the survey and its results.

Based on the results of this survey, the State thought it had made a mistake and that a tract of land existed between the Elkins grant and Hart's Location. On November 26, 1831, James Willey, New Hampshire's land commissioner, deeded this plot of land to Alpheus Bean and others. Over the years, both properties were sold to others until at the time of this case, Mr. Saunders was the owner of the Elkins grant and the Bartlett Land and Lumber Company, the owner of the Bean grant.

The point of dispute was the location of the eastern boundary of the Elkins grant, or exactly where the western boundary of Hart's Location was located on land. The decision in the lower courts was that although the original location of the boundary for the township known as Hart's Location had not been officially surveyed due to the mountainous nature of the land, the description in the 1772 grant and the 1830 deed was the correct one. The US Supreme Court affirmed the lower court's decision. In the decision, Justice Bradley said that there was overwhelming evidence that Hart's Location existed and that, therefore, its boundary was a monument that controlled courses and distances. Whether the boundary had been accurately surveyed or not did not matter; there was still a boundary that could be determined and therefore the lower court's decision to side with Mr. Saunders was correct.

Dams and Flooding

Could the state legislature give a private company the authority to build a dam that would damage other owners' property? Or does this permit the company to take the property of others without due process of law? In the nineteenth century many states, including New Hampshire, granted private businesses the equivalent of eminent domain by specifying this power in the charter that established the business. (In those days, each company set up in the State was granted an individual charter of incorporation by the state legislature.) States granted these powers to railroad companies to encourage the development of railroads, to manufacturers to make water power available and encourage the growth of factories, and to others as necessary to develop the economy.

Head
v.
Amoskeag Manufacturing Co.

Petitioner:	*Mr. Head*
Respondent:	*Amoskeag Manufacturing Co.*
Citation:	*113 US 9*
Lawyers:	*C.R. Morrison, George F. Hoar, B. Wadleigh*
Started:	*Unknown*
Decided:	*January 5, 1885*
Who Won:	*Amoskeag*
Decision:	*8–0*
Opinion:	*Justice Gray*

The New Hampshire Legislature passed an act on July 1, 1831 establishing a corporation, the Amoskeag Manufacturing Company, and granting it the power to erect on its land dams, canals, mills, buildings, and other structures that would be useful in manufacturing. More than 30 years later, the legislature passed a general mill act on July 8, 1868. The general act provided that if a duly authorized corporation built a dam that resulted in other people's land being damaged, the owner of the damaged land could go to court to obtain relief.

Mr. Head, owner of land upriver from the dams built in what is now Manchester by the Amoskeag Manufacturing Company, claimed that the water behind the dams had flooded and damaged his land. Dissatisfied by the verdict of the highest court in New Hampshire which awarded him $572.43, he appealed to the US Supreme Court in 1884. His attorney argued that eminent domain must be for public uses only and the Amoskeag was a private business. Mr. Head had therefore been unjustly deprived of his property without due process of law under the Fourteenth Amendment.

The attorneys for the Amoskeag countered that constructing a dam for manufacturing is a public use as the dams benefitted the people of the state. They also said that the general mill act provided a mechanism for Mr. Head and others like him to obtain compensation for any damages and that the mill act was a constitutional regulation of the property owners' water rights.

Justice Gray delivered the court's opinion. The court did not deal with the question of eminent domain but restricted itself to whether the general mill act was constitutional and within the power of a state legislature. The court affirmed the New Hampshire court's verdict saying that the state legislature has the power to regulate the use of running water and had provided property owners with a mechanism to be recompensed for any injuries to their land.

Law and Equity

When a person (or a corporation) has been harmed by someone else, the remedy may be money or it may be some action necessary to repair the damage. For example, if a company in its manufacturing process suddenly starts emitting a noxious odor in a nearby residential neighborhood, the residents may start an action in equity. This lawsuit would ask the court to require that the company stop emitting the odor that is making life in the neighborhood distasteful. This equity suit does not ask for money but rather that the company take a specific action. An action in law asks that someone who has been harmed be paid. An example of this type of suit could be in an accident involving two cars. A seriously injured passenger may sue the driver of the opposite car for money to pay for medical bills, loss of income, etc.

On October 29, 1824, F.W. Boynton sold Asa Parker land on the

Winnipiseogee (today the Winnipesaukee) River near Meredith Bridge, New Hampshire. The deed included water rights sufficient to operate water wheels for power. In 1855 Mr. Parker sued the Winnipiseogee Lake Cotton and Woolen Company for depriving him of his water rights by causing the water flow to be unequal at various times of the year.

Parker
v.
Winnipiseogee Lake Cotton and Woolen Company

Petitioner: *Asa Parker*
Respondent: *Winnipiseogee Company*
Citation: *67 US 545*
Lawyers: *Mr. Curtis, Mr. Hackett*
Started: *1855*
Decided: *Dec. 1862 term*
Who Won: *Winnipiseogee Co.*
Decision: *9–0*
Opinion: *Justice Swayne*

The Winnipiseogee Lake Cotton and Woolen Company had been incorporated by the New Hampshire Legislature on June 28, 1831 and given similar powers to the Amoskeag Manufacturing Company, including the right to build dams. In 1846 the company excavated at the Weirs and deepened the Perley Canal which tapped into Little Bay and discharged into the river. A stone dam was built in 1851 at Lake Village to raise the water level in Lake Winnipesaukee. Over the years the company spent about $300,000 to control the water which they used to supply the Merrimack River in times of drought. The water level in the Merrimack was crucial for the company as most of its shares were owned by the large manufacturing companies in Lowell and Lawrence, Massachusetts. These companies needed a reliable amount of water down river in the Merrimack to keep their mills running.

When Mr. Parker sued, alleging that his water supply was injured, the company countered that their improvements had actually improved his water supply by making it more even throughout the year. The US Supreme Court justices who heard the appeal from the Circuit Court of the United States for the District of New Hampshire said regarding the facts about the water supply, "we are left in doubt upon which side lies the truth." They could not find clear evidence that one side was wrong and the other right. What they did find, however, was that Mr. Parker had no standing in a court of equity. His suit was correctly dismissed by the lower courts. Mr. Parker's injury, if he had one, could have been identified and fixed by damages in an action of law. Other owners of land in the same situation as Mr. Parker had already been paid for damages by the company. Mr. Parker should have sued the company for money rather than suing in equity. The court also pointed out that by doing nothing until 1855, he "slept upon his rights" (67 US 545).

Why these Cases Matter Today

While today's importance of these cases is primarily historical, they illustrate the substantial role of the US Congress in determining what cases will be heard by the US Supreme Court on appeal. All three cases happened at a time when the Court had little if any control over the cases it heard. Consequently, they spent time affirming decisions made by Circuit Courts and State Supreme Courts. Many of these cases (two of the three here) had no constitutional or federal question involved. Congress came to realize that if lower courts had the authority to make final decisions, it would free the Supreme Court to give adequate time to consider the most important cases, interpreting the US Constitution and laws. It would also make justice speedier; Mr. Parker filed his suit in 1855 and it was heard by the US Supreme Court in 1862.

Pink Margarine and Water Power

Pink margarine. Men fined for selling a keg of gin without a license from the selectmen. Taxes on logs. None of these topics sounds like an issue that would today come before the US Supreme Court. Economic issues are comparatively seldom considered by the nation's highest court. Today the justices are more likely to consider cases about personal rights such as freedom of speech. From the beginning of the court until about 1937, exactly the opposite was true. Why has there been such a dramatic change?

Government and the Economy

When the US Constitution was written and ratified, there was little debate about the need to improve economic conditions in the thirteen states. Under the Articles of Confederation, each State had retained economic independence. Each State could coin money, tax products coming into and leaving the state, regulate any manufacturing and ignore the provisions of treaties made by the central government. For a modern equivalent, imagine for a moment that you are the owner of a company that makes personal computers in this state. You sell some of your computers to a company in Massachusetts. Under the Articles, the State of New Hampshire could tax your computers when they leave the State as an export and Massachusetts could tax them as an import. Additionally, the two states have different systems of money so you have to calculate the value of New Hampshire dollars compared to Massachusetts dollars. The ensuing chaotic economic conditions in the 1780s and events such as Shays' Rebellion had convinced people that the central government needed additional powers to coordinate the economy and promote growth.

Article 1, section 8, clause 3 delineates the power given to the US Congress to "regulate Commerce with foreign nations, among the several States, and with the Indian tribes." Two competing interpretations of "regulate Commerce ... among the several States" quickly developed. One was that favored by Alexander Hamilton; this theory stated Congress could regulate all commercial activity in the United States. The other theory supported by Thomas Jefferson was that the phrase refers only to activity between two or more states; activity completely within one State was not controlled by Congress. The resulting questions "generated more litigation between 1789 and 1950 than any other clause in the Constitution" (Oxford, 1992, p. 167).

Alcohol Sales

Peirce et. al.
v.
State of New Hampshire

Petitioner:	*A. Peirce, Jr. & T.W. Peirce*
Respondent:	*State of New Hampshire*
Citation:	*46 US 504*
Lawyers:	*Mr. Hale, Mr. Burke*
Started:	*January 20, 1842*
Decided:	*January term, 1847*
Who Won:	*State of New Hampshire*
Decision:	*6–0*
Opinion:	Seriatim

Individuals and companies used this ambiguity (all activity or only activity across state lines) to appeal cases to the US Supreme Court to determine if state laws were unconstitutional.

In 1838, New Hampshire passed a law requiring anyone selling alcoholic beverages in any amount to obtain a license from the selectmen of the town. What did the legislators hope to achieve with this law? Just a few years earlier the American Temperance Society had been founded and had already grown to 1.5 million members (Blocker, 1989, p. 14). New Hampshire reformers like those in other states were concerned with the growth in consumption of alcohol, particularly distilled spirits such as whiskey and with the effects of alcohol consumption of people's lives. New Hampshire's legislators, perhaps influenced by neighboring Massachusetts, were endeavoring to give local officials the ability to prohibit the sale of alcohol in their communities.

The idea that government should limit or prohibit alcoholic beverages was a significant change. In colonial times, "Virtually everyone drank virtually all the time" (Blocker, p. 3). Most production and consumption of alcohol took place within the family. Beer, cider and wine were common beverages at meals and on social occasions. The colonies following the English example did have laws to prevent being drunk *and* disorderly. By 1830, per capita consumption of alcohol had increased over even colonial times. One factor was that whiskey was often cheaper than tea or coffee. This was at a time when cities often provided polluted water if water was readily available at all, and milk available in cities was very unsafe to drink. Consequently, people drank distilled spirits such as whiskey at what appeared to be ever-increasing rates. Reformers were upset by the effects of this growing consumption on both families and the economy. At first they advocated moderate consumption of beer, cider and wine and total abstinence from distilled or ardent spirits. By 1836, many were promoting teetotaling for individuals and were supporting businesses that refused to allow workers to drink on the job. Some of these same reformers argued that by licensing sellers of alcohol, governments were making these sellers respectable. During the 1830s some Massachusetts counties became dry by county officials refusing to grant anyone a license to sell alcohol. In 1838, the same year that New Hampshire's new law essentially gave each town the right to decide whether alcohol would or would not be sold in the community, Massachusetts passed the Fifteen Gallon Law. Distilled spirits could only be sold in quantities of fifteen gallons or more unless for medical use. This made it impossible for most citizens of average means to afford alcohol.

Under New Hampshire's 1838 law, if alcohol was purchased by a New Hampshire citizen in another State or from a foreign country for resale in New Hampshire, did this law usurp a power granted to the US Congress? Andrew Peirce, Jr. and Thomas W. Peirce thought it might. The Peirces bought a barrel of gin in Boston and had it shipped up the coast and then overland to Dover. On January 20, 1842 they sold the gin still in the original barrel to Aaron Sias for $11.85; the Peirces did not have a license from the Dover selectmen to sell alcohol. Possibly Mr. Sias was one of many people who sold alcohol illegally, without a license. The Peirces were prosecuted, tried, found guilty and fined thirty dollars. Their case was appealed to the highest court in New Hampshire and then to the US Supreme Court.

The Peirces' attorney argued that the New Hampshire law should be declared unconstitutional because the requirement to obtain a license restricted trade among the states. Therefore, only the US Congress had the power to make such laws. The State of New Hampshire countered this argument by saying that the system of licensing was a police power that the State was exercising to improve society.

This case was heard by the Supreme Court along with similar cases from Rhode Island and Massachusetts. The court's decision was 6 to 0 to uphold the state laws, but the justices were seriously divided on the reasoning necessary to uphold them. One of the major reasons for the lack of unity was not the justices' concern about prohibition of alcohol in whatever form, or even the provisions of the Commerce Clause, but their desire to avoid any possible links between these cases and the burning issue of slavery. In arguing to uphold the Massachusetts law, Daniel Webster said that Massachusetts wanted to control liquor just as Southern states wanted to control dangerous ideas by keeping free black sailors on board ship in Southern harbors, thereby preventing contact with slaves.

With the issue of slavery in the background, nine different opinions were issued covering 129 printed pages! (Some treated each State separately.) In one opinion, Justice Woodbury, who was from New Hampshire, stated that "the subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade" (46 US 620). This reasoning could be used to protect slavery where it existed. He further suggests that the legislation that discourages the use of intoxicating liquor is within the states' police power because " ... its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime ... " (46 US 627). Clearly, he supported the Jeffersonian viewpoint on the role of government in the economy. In his opinion, Chief Justice Taney said that a State might regulate interstate commerce in those instances when the federal government had not already established regulations. Another judge said that the New Hampshire law was valid because it was an exercise of the state's police power and that only the federal government could regulate interstate commerce. Each justice tried to tailor his opinion very narrowly to avoid possible parallels to slavery and yet address the issue of states' regulation of the use of alcohol.

Lumber and Taxes

If the US Congress can regulate commerce among the states, at what point does a product become subject to those regulations? A case from Errol, New Hampshire asked the justices of the US Supreme Court to determine whether logs in transit from one State to another could be taxed by the State where they were physically located.

On April 1, 1880, Edward S. Coe, a resident of Maine, received a tax bill from the Town of Errol on the value of spruce logs that were stored in Errol waiting for the spring floods on the Androscoggin River. Some of the logs had been cut in Wentworth's Location, New Hampshire, and some had been cut in Maine. All of them were to be floated down the river to Lewiston, Maine where they would be taxed. When Mr. Coe got the tax bill, he filed a petition asking that the taxes be abated because the logs were in transit to another State and therefore were covered by the commerce clause of the US Constitution. The NH Supreme Court ruled that the logs cut in New Hampshire were properly taxed, but the ones cut in Maine and in transit back to Maine were not.

Mr. Coe, not being satisfied with this decision, appealed his case to the US Supreme Court. Justice Bradley gave the court's opinion in 1886. After reviewing the facts and the New Hampshire decision, the justice asked, "Does the owner's state of mind in relation to the good – that is, his intent to export them, and his partial preparation to do so – exempt them from taxation" (116 US 519)? As the justice points out, there must be a point in time when goods being shipped cease to be under the laws of a State and become subject to the national regulations that come from the commerce clause. The court's decision was that the point of national control comes only when the goods have been actually shipped or have started on a continuous journey to their destination. The logs cut in New Hampshire remained subject to New Hampshire taxation because they had not yet been shipped. The New Hampshire decision was affirmed and Mr. Coe had to pay his taxes.

Coe
v.
Town of Errol

Petitioner:	*Edward S. Coe*
Respondent:	*Town of Errol, New Hampshire*
Citation:	*116 US 517*
Lawyers:	*Henry Heywood, S.R. Bond*
Started:	*April 1, 1880*
Decided:	*Filed January 25, 1886*
Who Won:	*Town of Errol*
Decision:	*9–0*
Opinion:	*Justice Bradley*

Pink Margarine

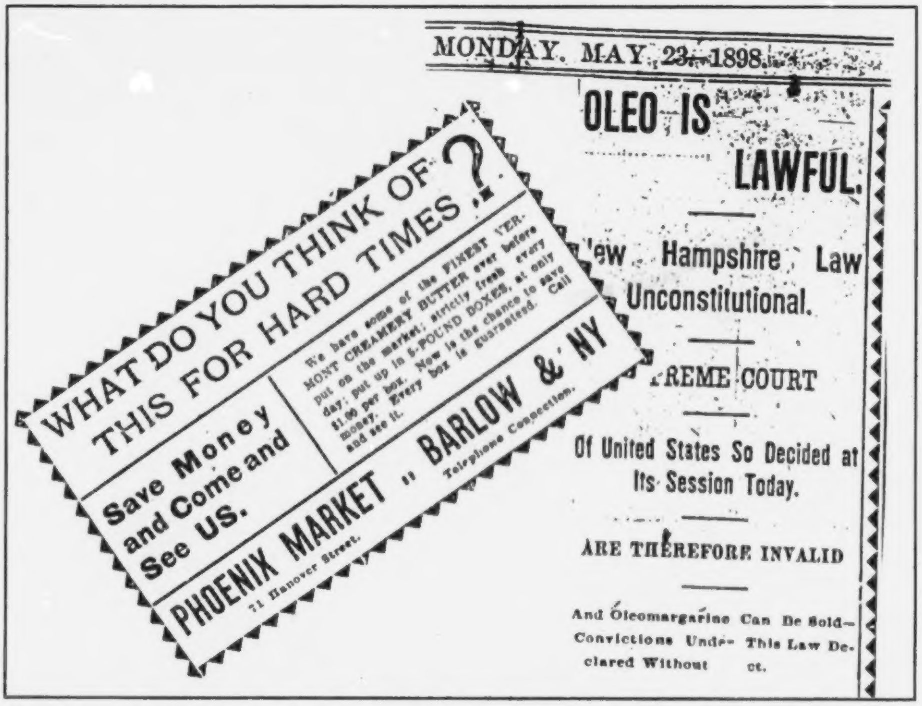
Who would buy pink margarine, or a package marked "adulterated butter?" New Hampshire passed a law in 1891 requiring that oleomargarine sold in New Hampshire be labeled in half-inch letters either adulterated butter or oleomargarine and that it be colored pink. Clearly this was an effort to protect New Hampshire farmers from competition in the butter market.

Mr. Collins was a wholesaler in Manchester for Swift and Company of Illinois. He sold oleo packaged in Illinois which met all of New Hampshire's standards except color. Tried and convicted, Collins was fined $100 plus the cost of prosecution. The NH Supreme Court affirmed his conviction and he appealed to the US Supreme Court.

On May 23, 1898, Justice Peckham delivered the court's opinion, which reversed the conviction. The court said that no one wants to buy pink margarine. The seller was required to add something to the product which makes it unsalable in order to lawfully sell it. This violated the commerce clause because New Hampshire was trying to prevent goods from other states entering this State by requiring provisions that effectively prevented all sales.

Collins
v.
State of New Hampshire

Petitioner:	*Collins*
Respondent:	*State of New Hampshire*
Citation:	*171 US 30*
Lawyers:	*William D. Guthrie, Richard C. Dale, Henry R. Edmonds, Albert H. Veeder (None for New Hampshire)*
Started:	*Unknown*
Decided:	*May 23, 1898*
Who Won:	*Collins*
Decision:	*7–2*
Opinion:	*Justice Peckham*



MONDAY, MAY 23, 1898.

OLEO IS LAWFUL.

ew Hampshire Law Unconstitutional.

REME COURT

Of United States So Decided at Its Session Today.

ARE THEREFORE INVALID

And Oleomargarine Can Be Sold—
Convictions Under- This Law De-
clared Without ct.

WHAT DO YOU THINK OF THIS FOR HARD TIMES?

Save Money and Come and See US.

We have some of the FINEST VERMONT CREAMERY BUTTER ever before put on the market; strictly fresh every day; put up in 5-POUND BOXES, at only $1.00 per box. Now is the chance to save money. Every box is guaranteed. Call and see it.

PHOENIX MARKET " BARLOW & NY

71 Hanover Street. Telephone Connection.

Manchester Daily Mirror and American, May 23, 1898, p. 1

BEST COPY AVAILABLE

Changes in Interpretation

Could the commerce clause be interpreted to permit states and/or the federal government the power to pass laws that protect workers? In the late nineteenth century and especially in the early twentieth century, the answer was usually no. The justices of the Supreme Court ruled in numerous cases that states did *not* have the power to limit the number of hours a person worked per week, to establish a universal minimum wage, to write laws regulating child labor, or to permit labor unions. In these opinions, the members of the court reflected the concerns of industrialists who wanted no government interference. They were upholding what they perceived as the property rights of owners and the liberty of contract between owners and workers. It was not until 1937, after President Roosevelt's failed plan to pack the court and until the court's membership changed, that changes in interpretation occurred. After 1937, the court's rulings increasingly supported the authority of the federal government to regulate what had become a national economy and the authority of both state and federal governments to legislate to protect workers.

Safety on the Roads

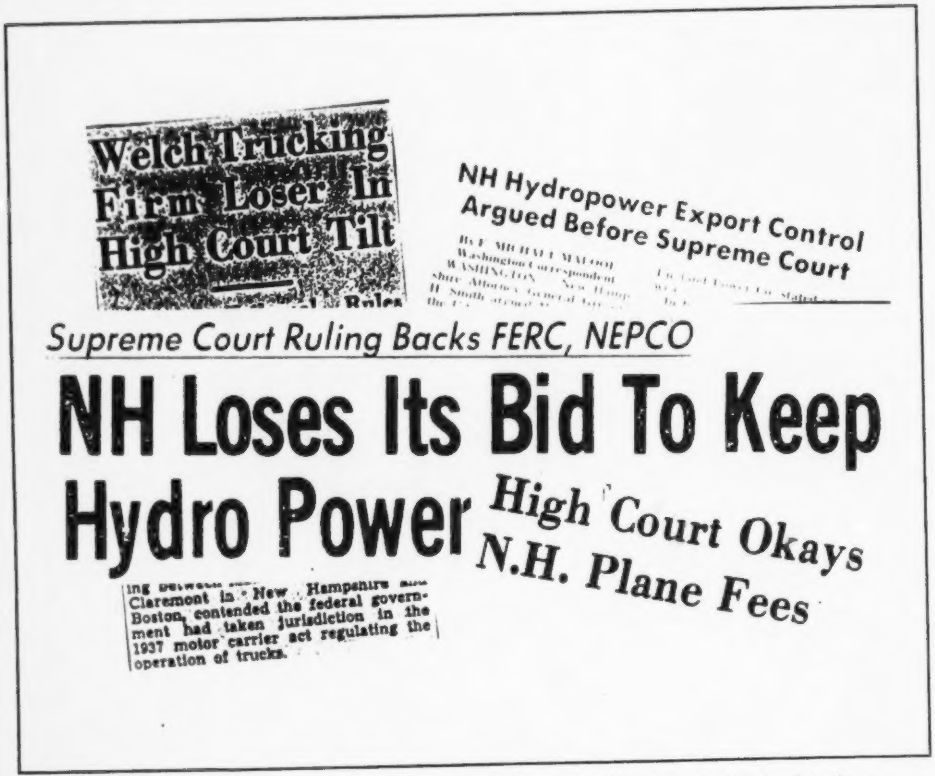
In 1939, this new focus was demonstrated in the case *H.P. Welch Company v. State of New Hampshire.* In 1933, the state legislature passed a law that regulated drivers of vehicles used as common and contract carriers. The law was intended to protect highway users from trucks operated by drivers who were fatigued. Drivers whose loads were solely the product of their own manufacture and drivers who operated only in one city or town or within ten miles were exempt from the provision that no driver could operate a vehicle for more than 12 hours continuously.

H.P. Welch Company
v.
State of New Hampshire

Petitioner:	*H.P. Welch Company*
Respondent:	*State of New Hampshire*
Citation:	*306 US 79*
Lawyers:	*Richard F. Upton, Dudley W. Orr, John E. Benton*
Started:	*April 13, 1937*
Decided:	*January 30, 1939*
Who Won:	*State of New Hampshire*
Decision:	*9–0*
Opinion:	*Justice Butler*

The Public Service Commission of New Hampshire was given the responsibility of enforcing the law. The commission established a rule that all drivers keep a record of their on-duty hours and that employers of such drivers submit monthly reports on all drivers. H.P. Welch Company was a Massachusetts business that registered with the Public Service Commission as common and contract carriers in 1936 and 1937. After a hearing on May 6, 1937, at which the company was represented by a lawyer, the Commission ordered that the company's common and contract carrier certificates be suspended for five days. The Commission ruled that the H.P. Welch Company had required or permitted drivers to be on duty for more than twelve hours continuously and had not submitted the monthly reports on each driver.

The company appealed the suspension based on two main reasons. First, they said that the New Hampshire law was unconstitutional because the exemptions of some drivers from the regulations was discriminatory. Second, the company said that the New Hampshire laws were superseded by the US Motor Carriers Act that gave responsibility for determining maximum work hours to the Interstate Commerce Commission.



Welch Trucking Firm Loser In High Court Tilt

Rules

NH Hydropower Export Control Argued Before Supreme Court

Supreme Court Ruling Backs FERC, NEPCO

NH Loses Its Bid To Keep Hydro Power

High Court Okays N.H. Plane Fees

ing between [illegible] New Hampshire and Claremont in New Hampshire Boston, contended the federal government had taken jurisdiction in the 1937 motor carrier act regulating the operation of trucks.

Concord Monitor. January 30. 1939. April 20. 1972. p. 2. *Manchester Union Leader*. February 25. 1982. p. 1. December 8. 1971. p. 1

BEST COPY AVAILABLE

The NH Supreme Court ruled that there were sound legislative reasons for the exemptions given to some drivers, such as if the driver was operating within a ten-mile radius, it could be presumed that he would have frequent breaks as he made deliveries and therefore would not be as fatigued as a driver operating a vehicle continuously. They held that the law's discriminatory provisions were constitutional but were based on sound reasons. They also ruled that because the violations of the state act happened between the time the US Congress passed the federal law and the time that the Interstate Commerce Commission established the national rules, the New Hampshire law was in force.

An appeal to the US Supreme Court was heard by the court on January 3, 1939. The decision shows the court's new focus on permitting state and federal governments to regulate in ways that protect workers. The court ruled that the New Hampshire law was constitutional. It also ruled that the federal law did not supersede the state law because the ICC rules had not gone into effect when the H.P. Welch Company allowed its drivers to exceed the 12-hour limit.

Who Pays and Who Benefits?

If residents of one State benefit from the services provided by another state, who should have to pay? In 1972, the Court ruled that New Hampshire and other states could levy service charges on each airplane passenger using scheduled commercial flights in the state. Justice Brennan, for the majority in a 7 to 1 decision, said in part " ... that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their

Northeast Airlines, Inc., et. al.
v.
State of New Hampshire Aeronautics Commission, et. al.

Petitioner: Northeast and other airlines
Respondent: New Hampshire Aeronautic Commission
Citation: 405 US 707
Lawyers: John K. Mallory, Jr., Joseph A. Millimet, J. Eugene Marans, W. Michael Dunn, Warren B. Rudman
Started: Unknown
Decided: April 19, 1972
Who Won: State of New Hampshire
Decision: 7–1
Opinion: Justice Brennan

construction and maintenance may constitutionally be imposed on interstate and domestic users alike" (405 US 714).

Who should benefit from a state's natural resources – only that state's residents? Or may private companies use those resources for the benefit of other state's residents? In 1980, the New Hampshire Public Utilities Commission withdrew its previously granted permission for the New England Power Company to sell hydroelectric power generated in the State outside the state. New England Power had six generating stations on the Connecticut River. The power went to the New England Power Pool, a group that cooperated to minimize costs to customers. Most of the power generated along the Connecticut was sold to customers in Massachusetts and Rhode Island. Because New England Power could produce electricity more cheaply than Public Service Company, the Public Utilities Commission wanted to reserve this power for New Hampshire citizens. If this hydroelectric power was sold exclusively in New Hampshire, local customers could save about $25 million per year. Chief Justice Burger gave the court's unanimous opinion that the commerce clause of the US Constitution prevents a State from requiring that companies give preference to state residents when utilizing natural resources of products derived from them.

New England Power Co.
v.
State of New Hampshire, et. al.

and

State of Massachusetts, et. al.
v.
State of New Hampshire, et. al.

and

Dennis Roberts II, Attorney General
of the State of Rhode Island, et. al.
v.
State of New Hampshire, et. al.

Petitioner: New England Power Co., Massachusetts & Rhode Island
Respondent: State of New Hampshire
Citation: 455 US 331
Lawyers: Samuel Huntington, Donald K. Stern, Gregory H. Smith
Started: September 19, 1980
Decided: February 24, 1982
Who Won: New England Power, Massachusetts & Rhode Island
Decision: 9–0
Opinion: Chief Justice Burger

Why these Cases Matter Today

Without the ability to regulate the economy, the federal government would have been unable in its early years to promote the growth of industry and transportation throughout the nation. More recent interpretations of the commerce clause have allowed state and federal legislatures to pass laws that require the payment of a minimum wage, that limit the number of hours worked each week, that prevent child labor, that allow workers to join labor unions without fear of losing their jobs and that require safe working conditions. All of these interpretations affect workers every day.

Bankruptcy and the Fields

When a person's (or a corporation's) debts become too great to manage, bankruptcy becomes an option. Bankruptcy is a legal process which allows a debtor (one who owes a debt) to discharge it (have the Bankruptcy Court declare that it no longer exists) or to make arrangements to pay the debt over a period of time. The intent of a bankruptcy is to allow the debtor a "fresh start," a chance to begin financial life anew, without a crushing burden of bills that can't be paid. But, there are limits to what can be done.

Background

Debtors who could not meet their financial obligations were harshly treated under the legal systems of most countries until relatively recently. At one time in ancient Rome, creditors were entitled literally to divide a debtor's body or to enslave debtors and their families. In 17th century England, debtors who were unable to satisfactorily explain their inability to pay were placed in the public pillory. Debtors might be put to death if their failure to pay their creditors was due to fraudulent practices. This extreme penalty was eventually halted, but for many years British courts ruled that debtors who failed to pay a judgment against them were guilty of a breach of the peace and could be jailed.

Since the late 19th century, bankruptcy law in the US has evolved to permit people who are unable to pay their unsecured debts (those debts that don't have some type of collateral pledged to assure their repayment) to have those debts discharged, if they were willing to give up their nonexempt property for distribution among unsecured creditors. Secured debts are either paid in full or the security is repossessed by the creditor. Both the federal bankruptcy statute and each State's laws now allow a debtor to retain some exempt property in order to permit the debtor's family to maintain a minimum standard of living. States' exemption laws vary widely in their generosity. New Hampshire currently allows debtors to exempt, among other things, their clothing, most of their furniture, a stove, a refrigerator, a sewing machine, a library to the value of $800, tools of the debtor's occupation, six sheep and their fleeces, one cow or a yoke of oxen or a horse, one hog and one pig, domestic fowl, one pew in the meetinghouse, and a car worth up to $4,000.

Most bankruptcies are begun by the debtor, who files a petition

Field
v.
Mans

Petitioner: *William & Norinne Field*
Respondent: *Philip Mans*
Citation: *116 S. Ct. 437 (1995)*
Lawyers: *Christopher Seufert,*
W.E. Whittington, IV
Started: *December 10, 1990*
Decided: *November 28, 1995*
Who won: *Field*
Decision : *Justice Souter*

with the United States Bankruptcy Court. A bankruptcy trustee, appointed by the court, then collects and liquidates the debtor's nonexempt property, if any, for the benefit of the unsecured creditors. Secured creditors are not affected by bankruptcy liquidations because they have taken collateral (such as a home mortgage) to ensure repayment of debts.

The Bankruptcy Code also allows both consumer and business debtors to try financial reorganization instead of liquidating their assets. A debtor proposes a reorganization plan to the creditors and the court. A typical plan requires payment from the debtor's future income. Businesses that wish to continue their operations, sometimes in a modified form, usually opt for Chapter 11 reorganization proceedings. Their proposals may combine payments from sales of some business assets with income from future business operations.

The Fraud Exception

Among the debts that can't be discharged are those "obtained by" fraud. For example, if a debtor had lied about income on a credit application in order to persuade a bank to approve a loan, the debt owed to the bank would not be discharged and would still have to be paid back, even after the bankruptcy. A question of fraud made its way from the US Bankruptcy Court in Manchester to the US Supreme Court in Washington, D.C.

The Fields Sell their Inn

In March 1987, William and Norinne Field sold their beachfront motor lodge and five acres to Philip Mans, a Lebanon developer. Mans paid $275,000 in cash to the Fields and agreed to pay them an additional $187,500 over time. This promise to pay was secured by a mortgage on the property. A clause in this mortgage stated that the Fields would have to consent to any transfer of the property or the unpaid balance of the mortgage would have to be paid on the sale of the property.

On October 8, 1987, Mans transferred the property to a new partnership that he had created. He didn't tell the Fields of this. Instead, he wrote to them the next day and asked them to waive their rights under the "due on sale" clause. Mans didn't bother mentioning that he had already transferred the property. The Fields offered to give up their rights for $10,500; Mans counter-offered $500, again failing to mention that the transfer had already been accomplished.

Three years later, the real estate market had plummeted. Mans filed a bankruptcy petition in 1990 in US Bankruptcy Court in Manchester. For the first time, the Fields discovered that Mans had transferred the property without their consent. They cried fraud. They asked the court to except Mans' debt to them from discharge.

Judgment in Manchester

The Bankruptcy Court held a trial in Manchester on the issue of whether Mans had obtained the debt by fraud. The court ruled that, in fact, Mans' letters were false representations and that the Fields had relied on those letters. However, the court also decided that the Fields had to show that they had "reasonably" relied on those letters; in other words, what would a "reasonable person" have done under these circumstances. The court suggested that a "prudent man" would have asked his attorney, could he transfer the property without my consent? The court said the attorney would have to answer yes. The court then said that the next question would be, well, let's see if he's done it. The court decided that a reasonable person would have gone to the Grafton County Registry of Deeds after receiving the letters from Philip Mans and checked to see if the property had been transferred. Since the Fields had not acted reasonably, the court held, Mans' debt was discharged and the Fields could not collect it. The Fields appealed to US District Court in Concord, lost there, appealed to the First Circuit Court of Appeals in Boston, lost there, appealed to the US Supreme Court in Washington, and finally won.

Justice Souter Agrees with the Fields

The Supreme Court accepted the Fields' appeal to resolve a conflict between the Circuit Courts of Appeals. Few cases are accepted by the Court, but one of the instances in which it does take cases is when the Circuit Courts are in disagreement. The First Circuit and Tenth Circuit had decided that reasonable reliance was the standard by which to judge the actions of a creditor. The Fifth, Seventh, and Eighth Circuits disagreed. Justice David Souter of New Hampshire wrote the majority opinion. Souter examined the history of the Bankruptcy Code and, especially, the history of the fraud exception. By referring to the Restatement of Torts, a book containing many rules of law, on the tort of fraudulent misrepresentation, Souter decided that "justifiable" reliance should be the standard. A person is justified in relying on a representation even though he might have investigated and found that the representation was false. That person does have to use his senses, however; he can't win his case if he ignores obvious facts. Souter gives the example of selling a horse represented to be "sound." If the buyer sees the horse before purchasing and a casual inspection would have disclosed that the horse only had one eye, then the buyer has not justifiably relied on the representation since anybody can easily detect a missing eye. However, if the horse has a defect only obvious to an expert horseman then the reliance is justifiable (long teeth in a "young" horse, Souter suggests).

Since the Bankruptcy Court used the wrong standard, the case was sent back to Manchester for a new trial. A hearing was scheduled for July 1996 to determine the outcome in view of the US Supreme Court's standard.

Why these Cases Matter Today

Whatever the ultimate result is for Mr. and Mrs. Field, this case has established the standard for Bankruptcy Courts to use in determining when the fraud exception applies. In future cases, people who ask these courts to require payment in full of a debt owed to them due to fraud, will need to show justifiable, not reasonable, reliance on the fraudulent misrepresentation. As this standard is less demanding, it may offer more protection to citizens.

"It's a Free Country . . ."

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment to the US Constitution

Fighting Words

Chaplinsky
v.
State of New Hampshire

Petitioner:	*Walter Chaplinsky*
Respondent:	*State of NH*
Citation:	*315 US 568 (1942)*
Lawyers:	*Hayden C. Covington, Frank Kenison*
Started:	*April 4, 1940*
Decided:	*March 9, 1942*
Who won:	*New Hampshire*
Decision :	*9–0*
Opinion:	*Justice Murphy*

Do you have the right to say anything you want to? The First Amendment says that Congress cannot abridge freedom of speech. Are there limits to free speech? Walter Chaplinsky tested the limits on a street corner in Rochester, New Hampshire.

Chaplinsky was a Jehovah's Witness, a religious sect that in the 1930s believed that all governments were demonic and that Witnesses did not need to obey secular laws. (This doctrine has changed since then.) Witnesses refused to enter military service and more than two thousand of them went to prison for their beliefs. In schools and elsewhere, Witnesses refused to salute the flag or pledge allegiance to it. It was, however, another belief of the Witnesses, that they must preach in public, that brought Walter Chaplinsky into conflict with the State of New Hampshire and into the US Supreme Court.

Chaplinsky stood at a corner in Central Square in downtown Rochester on April 6, 1940, handing out copies of *The Watch Tower*, the Jehovah's Witness magazine. He was also making disparaging comments about the Catholic religion, calling all organized religion a racket and calling priests racketeers. The City Marshal, Bowering, had received many complaints about Chaplinsky that afternoon and went to Central Square to ask Chaplinsky to move. He told

Chaplinsky that the crowd was getting angry. Chaplinsky told Marshal that a man named Bowman had grabbed him by the throat and asked, "Don't you believe in saluting the flag?" "I only recognize Jehovah," was Chaplinsky's reply.

After Bowering left, Chaplinsky reported that Bowman returned with a flag on a pole and attempted to spear Chaplinsky with it. He missed, but knocked Chaplinsky into the street. Bowman then set the flagpole in a hole in the corner and confronted Chaplinsky with, "You son-of-a-bitch, will you salute that flag?" When Chaplinsky refused, a small riot ensued and Marshal Bowering returned with several police officers to escort Chaplinsky to the safety of the police station. According to Bowering, Chaplinsky "opened up on me, called me a God-damned racketeer, a damn fascist, said all the city officials of Rochester were fascists or fascist agents." Chaplinsky was charged with the violation of Public Law Chapter 378 section 2, "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name ... ." Chaplinsky didn't deny any of his words, except to say that he never used the name of God.

Chaplinsky's first argument was that the statements were true (see *He Can't Say That!* beginning on page 65). The NH Supreme Court disposed of that argument quickly, since the law was designed to maintain the public peace. The direct tendency of the words, true or not, would be to provoke a person to acts of violence. That is what the law intends to prevent.

The US Supreme Court held that Chaplinsky was not entitled to use words in public places that were likely to cause a breach of the peace – also known as "fighting words." Words that are likely to cause violence and " . . . other disorderly words, including profanity, obscenity and threats ..." can be regulated by the State if they are likely to cause a breach of the peace.

The NH Supreme Court reasoned that even though the right to speak freely, whether on the street or elsewhere, is of primary importance, it can be limited in some situations. The exercise of a right is different from abuse of that right. While the First Amendment encourages full and free discussion of all subjects, especially of government, it does not allow for speech which does not serve any purpose other than to incite violence. In other words, name calling is not protected by the First Amendment.

Preaching and Parading

Saturday night, July 8, 1939 in Manchester. Besides the usual downtown window shoppers and strollers that night, the city saw 87 Jehovah's Witnesses march in single file from the Odd Fellows Hall on Hanover Street up and down Chestnut and Elm Streets carrying signs that read "Religion is a snare and a racket," "Fascism or Freedom?" "Serve God and Christ the King." The marcher handed out leaflets, but didn't create a disturbance of the peace. Among the leaders of the march were Willis Cox, Walter Chaplinsky (yes, the same who would disturb the peace the following year in Rochester), John Konides, Arvid Moody, and Oliva Paquette. These five would be charged with a misdemeanor – parading without a license. As Walter Chaplinsky later testified, "We do not ask any man for a permit to do what Almighty God asks us to do."

Cox
v.
State of New Hampshire

Petitioner:	*Willis Cox*
Respondent:	*State of New Hampshire*
Citation:	*312 US 569 (1941)*
Lawyers:	*Hayden C. Covington, Frank Kenison*
Started:	*July 8, 1939*
Decided:	*March 31, 1941*
Who won:	*New Hampshire*
Decision :	*9–0*
Opinion:	*Chief Justice Hughes*

The law at issue stated:

> *"No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for." Public Law Chapter 145 section 2.*

Arvid Moody gave the Superior Court jury his definition of a parade:

> *"A parade is a vain display of men in uniform and an information march is an orderly progressive forward movement pertaining to God's Kingdom's message." (Manchester Union,* Nov. 23, 1939)

Judge Young gave the jury their instructions:

> *" ... so far as I am able to discover there is very little difference between a parade and a procession. A procession may be described as a train of persons or vehicles advancing in an orderly or regular manner in a continuous course ... A parade may be described as any march or procession or any movement marching in something like military order, for show, display, or exhibition."* (*Manchester Union,* Nov. 23, 1939)

The jury preferred Judge Young's definition and found the defendants guilty, sending this case to the NH Supreme Court. That court affirmed the convictions and the Witnesses appealed to the US Supreme Court.

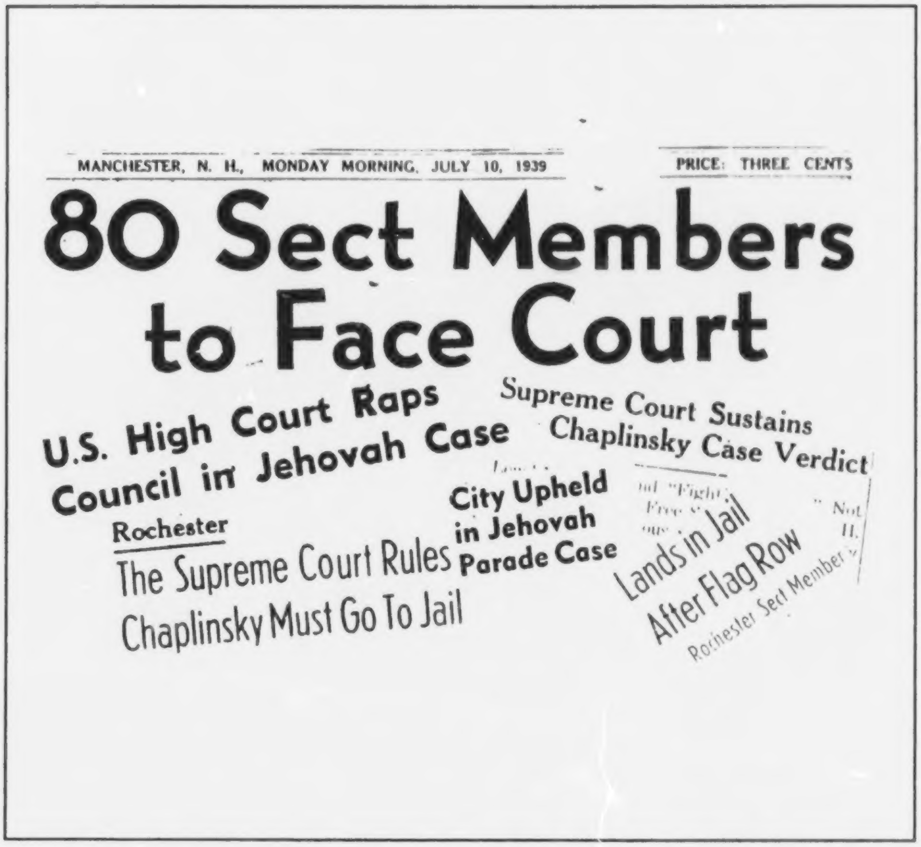
The US Supreme Court decided that the restrictions in New Hampshire were reasonable. Cities and towns can regulate the use of their streets and sidewalks for the safety and convenience of the public and can set reasonable rules as to the time, place, and manner of any parade. They may also charge a reasonable license fee. Basically, the Court ruled that Manchester's actions did not infringe on freedom of speech, freedom of religion, freedom of the press, or the freedom to assemble. A person cannot, the Court stated, ignore reasonable regulations just to "direct public attention to an announcement of his opinion."

Preaching in the Park

Over the years, the Witnesses changed their tactics and tried to work within the laws. In 1950, William Poulos and Robert Derrickson, ordained Jehovah's Witness ministers, applied to the Portsmouth City Council for a permit to hold a public meeting in Goodwin Park. Portsmouth had a city ordinance nearly identical to the state law that was upheld in *Cox v. New Hampshire*. Poulos and

Poulos
v.
State of New Hampshire

Petitioner:	*William Poulos*
Respondent:	*State of New Hampshire*
Citation:	*345 US 395 (1953)*
Lawyers:	*Hayden Covington,* *Gordon Tiffany*
Started:	*July 2, 1950*
Decided:	*April 27, 1953*
Who won:	*New Hampshire*
Decision :	*7–2*
Opinion:	*Justice Reed*



MANCHESTER, N. H., MONDAY MORNING, JULY 10, 1939

PRICE: THREE CENTS

80 Sect Members to Face Court

U.S. High Court Raps Council in Jehovah Case

Supreme Court Sustains Chaplinsky Case Verdict

Rochester

The Supreme Court Rules Chaplinsky Must Go To Jail

City Upheld in Jehovah Parade Case

Lands in Jail After Flag Row

Rochester Sect Member

Foster's Daily Democrat, Tuesday, March 10, 1942, p. 2. *Rochester Courier*, March 12, 1942, p. 1. *Portsmouth Herald*, April 28, 1953, p. 1. *Manchester Union*, July 10, 1939, p. 1. April 8, 1940, p. 1. April 1, 1941, p. 3.

Derrickson appeared before the council, explained that they would give lectures on the Bible which would show that Armageddon was rapidly approaching, and offered to pay a reasonable fee for use of the park. The council refused to give them a permit, stating that they had never had a religious group use a public park and that they were fearful of creating a disturbance if the permit was granted. The Witnesses didn't take no for an answer, and held their meeting anyway. Derrickson spoke for about 45 minutes before a police officer arrived and asked him if he had a permit. Derrickson admitted he did not have one and was told to stop talking. Derrickson refused, and was arrested. The next Sunday, July 2, 1950, William Poulos spoke in Goodwin Park before a "large number of persons" for about 15 minutes until he duplicated Derrickson's fate. Both men were fined $10 and immediately appealed their convictions to Rockingham County Superior Court. After two trips to the NH Supreme Court (with a Superior Court conviction in between), the

BEST COPY AVAILABLE

case made its way to the US Supreme Court. Robert Derrickson had died in the meantime, so Poulos carried the load himself (with his lawyers, of course).

The US Supreme Court wasn't any more helpful to Poulos than it had been to Cox or Chaplinsky. The Court stated, "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time form a group for discussion or instruction" (345 US 405). So long as licenses are issued without discrimination, the city may regulate when and where public meetings may be held. Both the NH Supreme Court and the US Supreme Court agreed with Poulos that the Portsmouth City Council acted arbitrarily and unreasonably in denying the Witnesses a license to use Goodwin Park. It was not good enough for the council to deny the license simply because no other religious group had ever asked for one or because the council feared trouble. But even though Poulos was right on that issue, he still lost his appeal. Why? Because both courts decided that the issue was not what Portsmouth did, but whether Poulos could be punished for violating the city ordinance, even though the council had acted unconstitutionally. Both courts decided that the proper remedy for an unconstitutional action by a government is to go to court, to use the judicial system to force a proper action by government, even though it may take years of delay, rather than to simply violate the ordinance. The result – Poulos' conviction and fine stand.

Justices Hugo Black and William O. Douglas dissented from the court's ruling. They both argued that it was wrong to find a person guilty of violating an unconstitutional action by a government; that is, that when the Portsmouth City Council violated the First Amendment by refusing to let Poulos have a license to speak in the park, the State of New Hampshire should not have convicted Poulos of violating the law. The primary basis for this argument is that free speech deserves special protection in our society. As Justice Douglas said, "There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made."

Live Free or Die

The Jehovah's Witnesses finally beat New Hampshire in the US Supreme Court in 1977. The issue – license plates.

George and Maxine Maynard were Witnesses who lived in Leba-

Wooley
v.
Maynard

Petitioner:	*Neil Wooley*
Respondent:	*George Maynard*
Citation:	*430 US 705 (1977)*
Lawyers:	*Robert V. Johnson, II,* *Richard S. Kohn*
Started:	*January 3, 1975*
Decided:	*April 20, 1977*
Who won:	*George Maynard*
Decision :	*6–1–2*
Opinion:	*Chief Justice Burger*

non, New Hampshire. They found the state motto "Live Free or Die," which appeared on their passenger car license plates, to offend their religious beliefs. They placed tape over the slogan but someone removed it. After several more tapings, George took some tin snips and cut the motto out of the plate. For his efforts he was issued a summons to Lebanon District Court for a violation of the motor vehicle code. He represented himself, pleaded not guilty, and explained to the judge his religious objections to the motto. The judge found him guilty, but suspended his $25 fine. A month later George was charged with another violation for defacing the license plate. The court this time gave Mr. Maynard a suspended jail sentence and ordered him to pay the previously suspended $25 fine. George replied that, as a matter of conscience, he would not pay the fine. The judge sent him to the Grafton County House of Correction for 15 days.

Even before his trial on the second offense, George had been charged with a third offense. This time the Maynards went to Federal Court to get an injunction against the State of New Hampshire. They asked Judge Hugh Bownes to stop the State (actually Neil Wooley, the Lebanon Police Chief) from prosecuting them under the motor vehicle law which made it a crime to obscure the motto on the plate. He granted the injunction and an appeals panel agreed with him. The State of New Hampshire appealed to the US Supreme Court.

Chief Justice Burger summed up the issue before the Court – "... whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on private property in a manner and for the express purpose that it may be observed and read by the public" (430 US 705). In nonlegal English – can the government force a person to show its political slogan on his private property? In a word – no.

The First Amendment contains the right to speak freely and the right not to speak at all. The Court had decided in another Jehovah's Witness case in 1943 that a school board could not compel students to salute the flag. The First Amendment does not allow the government to force a person to promote a point of view that person finds unacceptable. The Court wrote that requiring the Maynards to use their car as a "mobile billboard" for the state legislature's point of view violates their First Amendment right to hold a different point of view.

The State argued that its interests were sufficient to justify forcing the Maynards to carry the motto. Those interests were that the motto helps identify passenger vehicles and that the motto promotes an appreciation of state history, individualism, and state pride. The Court found that the State has easy ways of identifying its plates without the motto. The second purpose is one that promotes the State legislature's political beliefs. When those come into conflict with the Maynards' beliefs, the State cannot overcome the Maynards' right to avoid becoming the courier for the State's message.

The Maynards' conflict with the State of New Hampshire did not end with the Supreme Court's decision. Judge Bownes awarded attorneys' fees to the Maynards for having won their civil rights challenge in federal court. Governor Meldrim Thompson was in no hurry to pay, as the decision was not to his liking. After a long delay, the Maynards' attorneys asked the US Marshal to collect their fees from the State – more than $20,000. US Marshal Robert Raiche and his deputies first considered taking the gold off the State House dome. After deciding that it was too cold for that method of collection, they drove to a place where they knew the State had plenty of cash with which to pay the judgment – the Hooksett liquor store. The marshals arrived and demanded payment of the fees. After a few desperate phone calls to the Governor, he agreed to pay by check. The Maynards took their money and moved to Connecticut. Whether they have taped over "Constitution State" is unknown.

Why these Cases Matter Today

Together these cases helped to clarify the meaning of the First Amendment. The government may not force a person to promote a point of view which the person finds objectionable. Citizens, however, have some restrictions as well. They may not use fighting words that could cause a breach of the peace. Their right to assemble may be reasonably regulated by governments with regard to the time, place, and manner of demonstrations. When a government regulates free speech or assembly in a way that someone thinks is unconstitutional, the first line of defense should be the courts, not civil disobedience. All citizens benefit when individuals are willing to pursue cases such as these that explain more fully the relationship between our government and the citizens.

He Can't Say That! Can He?

How free are newspapers and other types of media to publish information that may harm a person's reputation? If someone is harmed, is the newspaper protected by the First Amendment? There is a constant tension between Congress making "no law … abridging the freedom … of the press and an individual's ability to protect himself from libel and slander." Two cases from New Hampshire demonstrate this.

Newspapers and Libel

Rosenblatt
v.
Baer

Petitioner:	*Alfred D. Rosenblatt*
Respondent:	*Frank P. Baer*
Citation:	*383 US 75 (1966)*
Lawyers:	*Arthur Nighswander,* *Stanley Brown*
Started:	*January 29, 1959*
Decided:	*February 21, 1966*
Who won:	*Petitioner*
Decision :	*8–1*
Opinion:	*Justice Brennan*

Defamation – the tort (a civil wrong) of injuring a person's good name. If it's printed it's libel; if it's said aloud it's slander. Either way, it tends to lower someone's reputation in the community and it can result in money being awarded by a court. But remember – truth is a defense.

Alfred Rosenblatt wrote an unpaid column of political commentary for the *Laconia Evening Citizen*. In 1959 he wrote about the management of the Belknap Recreational Area (now the Gunstock Ski Area):

> *"This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic; almost unbelievable."* …
> *"What happened to all the money last year? and every other year? …"* (*Laconia Evening Citizen*, Friday, January 29, 1960, p. 12)

Frank Baer had previously been in charge of the Recreational Area. He read the column and felt that it implied mismanagement and worse during his term. He brought suit in Belknap County Superior Court. At trial, Baer called witnesses who testified that they under-stood the article to imply that Baer had stolen money from the ski operation. Baer testified that after the column was published, he became depressed and had a difficult time finding a new job. The trial started on April 8, 1963 and on April 19, 1963 the jury returned a verdict for Baer and awarded him $31,500. Rosenblatt appealed to the NH Supreme Court, which agreed with the trial court. Rosenblatt then brought his appeal to the US Supreme Court.

New York Times v. Sullivan

Before Rosenblatt's appeal reached the NH Supreme Court, the US Supreme Court had issued a major decision concerning defamation. The case concerned an advertisement placed in the *New York Times.* The plaintiff in that case was the police commissioner of Montgomery, Alabama. The ad stated that, after a civil rights demonstration, "truckloads of police ... ringed the Alabama State College Campus" and that Martin Luther King, Jr. had been "arrested ... seven times." The statements were false since the police had not actually "ringed" the campus and since Dr. King had only been arrested four times. Sullivan sued the *Times,* claiming that these false statements had defamed him since he was the police commissioner. He won his case in the Alabama courts, but the US Supreme Court reversed. The court decided that the First Amendment protections of freedom of speech and freedom of the press meant that criticism of the actions of a government could not be used to establish that a person in charge of that government was defamed. The court ruled that an "impersonal" attack, that is, one that criticized the actions of the government rather than an individual personally, could never be called libel. Remember, freedom of the press and freedom of speech always allow criticism of the government.

The US Supreme Court also decided that "public officials" could sue for defamation only if they could prove that the statement was false and that the statement was made knowing that it was false or if it were made "in reckless disregard of whether it was false or true." In other words, a public official must prove that the statement was made with "actual malice."

"Public Official"

Rosenblatt argued that the trial judge had made two mistakes when he gave his instructions to the jury. First, he claimed that Superior Court Judge Grant was wrong when he told the jury that "an imputation of impropriety or a crime to one or some of a small group that cast suspicion upon all is actionable." Second, he claimed that Judge Grant was wrong when he told the jury that a "negligent misstatement of the facts" was enough to prove that Baer had been libeled. (Negligence means failing to use ordinary care.)

The US Supreme Court agreed with Rosenblatt that he had not specifically named Baer in his newspaper column and that the First Amendment protected his right to question the actions of a governmental organization, the Belknap Recreation Area. Even though Baer had presented witnesses at trial who testified that they believed the column referred to him, the US Supreme Court ruled that since the article had criticized the way that the Belknap Recreation Area had been run and did not accuse any individual, namely Baer, of wrongdoing, he could not sue for damages. If Baer had been allowed to collect damages, the court reasoned, it might have prevented newspapers from showing the public how government conducts its business.

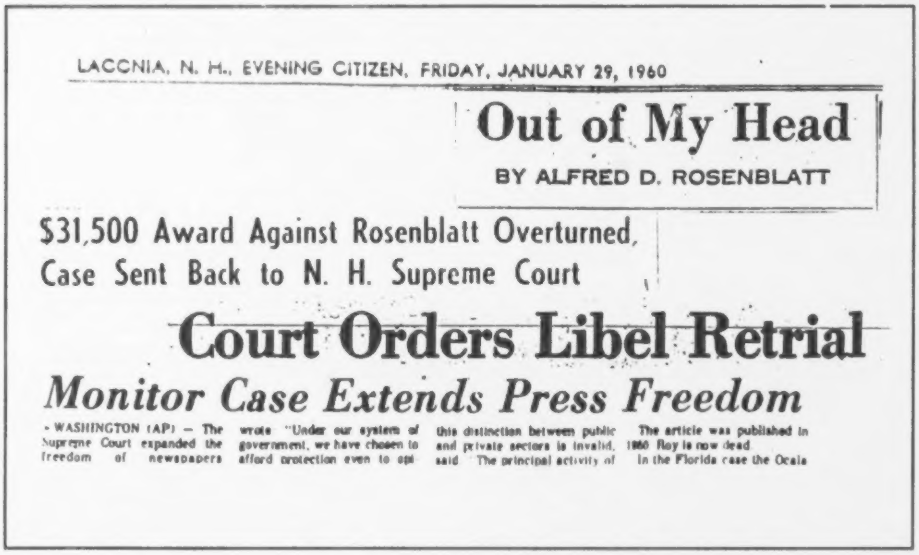
The court also agreed with Rosenblatt that, even if everyone believed that the column referred to Baer, it didn't change the outcome because Baer was a public official. There is an important commitment in our Constitution to open debate on public issues and that sometimes that debate can include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Criticism of government is at the very center of the First Amendment. It is very clear, the court ruled, that the designation of "public official" applies to government employees who have substantial responsibility for control of government affairs. By this definition Baer was a public official, and had to prove that Rosenblatt had acted with malice.

In the end Baer did not collect his jury award and Rosenblatt had upheld the principles of the First Amendment.

" ... A Former Small-Time Bootlegger"

On September 10, 1960, three days before the primary election to nominate the Democratic candidate for the United States Senate, a column by Drew Pearson appeared in the *Concord Monitor*. In the column, Pearson referred to "a former small-time bootlegger and later US Marshal, Alphonse Roy." Mr. Roy took offense to that characterization and sued the *Monitor* and the North American Newspaper Alliance which syndicated Pearson's column.

Alphonse Roy was a longtime player in Democratic Party politics. He had been born in Canada, grown up on the west side of Manchester, had little schooling, but was self-educated while working in the textile mills. He was first elected to the New Hampshire Legislature in 1924 and later was elected to the Governor's Council, was a Manchester Alderman, and was elected to Congress in 1936. He also lost elections to Congress in 1938, 1940, and 1958; lost the elections as Hillsborough County Sheriff in 1942 and 1944; lost the election as Mayor of Manchester in 1954; and lost the election as Register of Deeds in 1956. He was, however, appointed US Marshal for New Hampshire in 1945 and remained Marshal until 1953.



LACONIA, N. H., EVENING CITIZEN, FRIDAY, JANUARY 29, 1960

Out of My Head

BY ALFRED D. ROSENBLATT

$31,500 Award Against Rosenblatt Overturned, Case Sent Back to N. H. Supreme Court

Court Orders Libel Retrial

Monitor Case Extends Press Freedom

WASHINGTON (AP) — The Supreme Court expanded the freedom of newspapers

wrote "Under our system of government, we have chosen to afford protection even to opi-

this distinction between public and private sectors is invalid, said "The principal activity of

The article was published in 1960 Roy is now dead.

In the Florida case the Ocala

Concord Monitor, February 25, 1971, p. 2, March 31, 1972, p. 3. *Laconia Evening Citizen*, January 29, 1960, p. 1. February 22, 1966, p. 1.

Drew Pearson was one of the original investigative reporters. Pearson reported on the wrongdoings of government officials in his column called "D.C. Merry-Go-Round." The column appeared all over the country through a newspaper syndicate. One of those newspapers carrying the column was the *Concord Monitor*.

In 1960, Styles Bridges was a Republican Senator from New Hampshire up for reelection. He had no opposition in the Republican primary, but the Democratic Party had a handful of candidates eager to challenge Bridges. Roy entered the primary on July 25, three days before the filing deadline. The only candidate up to that time was Herbert Hill, a professor from Dartmouth College. On July 28, the filing deadline, three other candidates filed to run for the Demo-

BEST COPY AVAILABLE

cratic nomination: Clement Robinson, Harold McCarthy, and Frank Sullivan. This last candidate had a criminal record which included 19 convictions for drunkenness.

Pearson wrote in his column that Alphonse Roy had called the warden of the Hillsborough County Jail to find out whether Sullivan would be released in time to file for the primary. The allegation by Pearson was that Roy was trying to split the vote for Hill by running several candidates so that Roy would win the primary.

During the trial, Pearson described the information that he had received concerning Roy's reputation for being a bootlegger. That information came from people who knew Roy and said that he had claimed to have been involved in bootlegging. Roy, on the other hand, had never been arrested for bootlegging and denied any involvement.

The jury believed Alphonse Roy and returned verdicts of $10,000 each against the *Concord Monitor* and the North American Newspaper Alliance. They appealed to the NH Supreme Court and, following that court's affirmation of the verdict, to the US Supreme Court.

Candidate as a Public Official

The US Supreme Court first took care of a little housekeeping in its rules involving defamation. Their previous decisions had all focused on whether an individual was a public official. Roy was not an official; he held no office. The court ruled that candidates for public office are "public figures" and, as such, are to be treated the same as officials. Therefore, they must also prove actual malice if they claim to be defamed.

Is it Relevant?

Superior Court Judge Morris told the jury that Roy was a public official. He then told the jury that they could award damages to Roy if they found that the column was false and had not been made in good faith with a reasonable belief in its truth. The US Supreme Court decided that this jury instruction did not meet its test of "actual malice" and that Roy would have to show why *New York Times v. Sullivan* did not apply. Roy argued that he had to show actual malice only if the false statement was one that related to "official conduct" and that for a candidate that meant "conduct relevant to fitness for office." The court decided that when a person runs for office he puts his reputation before the public and that any statements about his character are fair game. A charge of criminal conduct, the court held, can never be irrelevant to a candidate's fitness for office.

The jury's verdict was reversed.

Why these Cases Matter Today

The First Amendment guarantees the rights of free speech and freedom of the press. While these cases did not break new ground, they further refined the law of defamation. Without these protections, public officials would have powerful weapons with which to silence criticism of the manner in which they operate.

Questions of Fairness

When the US Constitution was written, state constitutions with provisions for protecting individual's rights were already in existence. Thus when the Bill of Rights was added, it was done to protect people from actions of the national government. It was not until the addition of the Fourteenth Amendment in 1868 that the possibility of applying the provisions of the Bill of Rights to actions by state and local officials even existed. It was not until this century, and particularly during the era of the Warren Court, that the due process phrase of the Fourteenth Amendment was regularly interpreted as applying the guarantees of the first ten amendments to the actions of non-federal officials. Due process of law includes all the protections guaranteed to a person when the government acts against him/her in any way. Two New Hampshire cases have been considered by the US Supreme Court in recent years on the meaning of due process of law.

Objectionable Slogans and Minors

Can a person be convicted of contributing to the delinquency of a minor for having available for sale a button with a slogan that many people would find objectionable? Dennis Vachon operated a head shop in Manchester where beads, posters, dresses and other items were for sale. On July 26, 1969, a 14-year-old girl and her friend went into Vachon's store where the girl purchased a button that said "Copulation Not Masturbation" for 25 cents. The two girls went out to eat and later went to a rectory, where a priest they visited saw the pin and took it away after explaining to them what it meant. Dennis Vachon was arrested and subsequently waived his right to a jury trial. The judge found him guilty of willfully contributing to the delinquency of a minor, and sentenced him to 30

Dennis M. Vachon
v.
State of New Hampshire

Petitioner:	*Dennis Vachon*
Respondent:	*State of New Hampshire*
Citation:	*414 US 478*
Lawyers:	*None*
Started:	*July 26, 1969*
Decided:	*January 14, 1974*
Who Won:	*Vachon*
Decision:	*6–3*
Opinion:	Per curiam

days in the County House of Correction and fined him $100. The NH Supreme Court upheld his conviction, with only Justice Grimes dissenting. The court said that the law concerning the delinquency of minors was important to prevent minors from becoming delinquents, and that selling an obscene button could be injurious to the minor's morals. Wearing such a button could lead to other people soliciting her to commit immoral acts. Because Mr. Vachon owned the store, he knew what was offered for sale there and that minors could purchase them. Therefore they affirmed the lower court.

Mr. Vachon appealed to the US Supreme Court which issued a *per curiam* decision, one in which the court gives its decision without being signed and usually without having heard any oral arguments. The justices in the majority reversed and remanded the State Courts' decisions. They said that Mr. Vachon's due process rights had been violated because the State never offered any proof that Mr. Vachon himself had sold the girl the button, or that he was even aware of the sale. The girl could not identify Mr. Vachon as the one who sold her the button. This lack of crucial evidence made Mr. Vachon's conviction unfair, and thus denied him due process of law.

Release–Dismissal Agreements

In 1983, a Rockingham County grand jury indicted David Champy for aggravated felonious sexual assault. One of his friends, Bernard Rumery, read about the charges in the paper and wanting to know more, called a mutual acquaintance, Mary Deary. Apparently unknown to Mr. Rumery at that time was the fact that Ms. Deary was the victim and was expected to be the main witness against Mr. Champy.

Town of Newton, etc., et. al.
v.
Bernard E. Rumery, Jr.

Petitioner: *Town of Newton, New Hampshire*
Respondent: *Bernard Rumery*
Citation: *480 US 386*
Lawyers: *Donald E. Gardner, Charles P. Bauer*
Started: *March 12, 1983*
Decided: *March 9, 1987*
Who Won: *Town of Newton*
Decision: *5–4*
Opinion: *Justice Powell*

The Chief of Police for the Town of Newton, David Barrett, received a call from Ms. Deary on March 12, 1983 in which she told him that Mr. Rumery was trying to force her to drop the charges against Mr. Champy. The substance of a further telephone conversation between Ms. Deary and Mr. Rumery on May 11 is disputed. Mr. Rumery claimed she called him; she claimed he threatened that if she went ahead with the charges she would end up murdered. Chief Barrett arrested Mr. Rumery on charges of witness tampering.

An experienced criminal defense attorney, Stephen Woods, was hired by Mr. Rumery. Mr. Woods and one of the deputy county attorneys, Brian Graf, had discussions which resulted in an agreement that the charges against Mr. Rumery would be dropped if he signed an agreement not to sue the town, its officials or Ms. Deary for any harm that the arrest might have caused. One reason Mr. Graf decided to negotiate this agreement was his desire to protect Ms. Deary from having to testify against Mr. Rumery as well as Mr. Champy. Mr. Woods discussed the agreement with Mr. Rumery and three days later, June 6, 1983, it was signed. This is referred to as a release-dismissal agreement.

Can He Sue Anyway?

On April 13, 1984, Mr. Rumery filed a suit in the US District Court for the District of New Hampshire. He was suing the Town of Newton and its officers for violating his constitutional rights. The town filed a motion to dismiss the suit based on the release-dismissal agreement. Mr. Rumery said the agreement was not an enforceable contract because it violated public policy. The US District Court ruled in favor of the town because it said Mr. Rumery was an intelligent man who had the benefit of a competent, experienced attorney. Therefore his decision to sign the agreement was voluntary, informed and deliberate.

On appeal, the Circuit Court reversed the lower court's decision and invalidated release-dismissal agreements *per se*. This court reasoned that enforcing such agreements would tempt prosecutors to make up charges against defendants who had even legitimate civil rights claims.

Because of the sweeping nature of this decision and its impact on the administration of criminal justice, the US Supreme Court agreed to hear the case.

A Majority Opinion ...

This court split 5 to 4, with the majority reversing the Circuit Court and remanding the case to the District Court for dismissal of Mr. Rumery's complaint. In his opinion for the majority, Justice

Powell said that release-dismissal agreements are not all invalid, that each case should be evaluated according to traditional common law principles as to whether a particular agreement is unenforceable. There may be instances where both the defendant's and the public's interests are served by such agreements. The fact that the defendant must make a difficult choice when deciding whether to sign such an agreement does not make such agreements coercive in nature. Defendants in criminal cases are sometimes asked to make other equally difficult choices in which they agree to give up some of their constitutional rights (such as in a plea bargain), and requiring these choices to be made is not necessarily unconstitutional.

Looking at the other side of the agreement, Justice Powell said that prosecutors also have to continually make tough decisions. They have to decide which cases will be prosecuted or plea bargained, which cases warrant having charges dropped and which cases are appropriately resolved by release-dismissal agreements. To automatically invalidate all such agreements is to presume that all prosecutors will act improperly, using these agreements to coerce defendants. The Court's majority believed that these agreements may help prosecutors and the public in legitimate ways and that therefore the agreements should continue to be one possible tool for prosecutors and defendants. In this particular case, Mr. Rumery voluntarily signed the agreement and the prosecutor, Mr. Graf, had a valid reason, sparing Ms. Deary, for entering the agreement. It was in the public's interest to uphold the agreement.

... And Dissent

The four justices who dissented are represented by an opinion written by Justice Stevens. The dissent agreed with the Circuit Court in viewing such release-dismissal agreements as inherently coercive. This view says that a completely innocent person should not have to choose between a threatened trial with the possibility of a wrongful conviction and giving up the right to sue people who have violated his or her constitutional rights. In this case, Mr. Rumery was arrested by the Newton police before they had obtained a signed statement from Ms. Deary. He was arrested "on the basis of a sketchy statement by Chief Barrett" (480 US 406). He was a respected member of the community with no prior arrests, not even for traffic violations. By requiring Mr. Rumery to give up his right to sue Newton officials in return for dropping any criminal charges, the agreement forced Mr. Rumery to pay a price that was unrelated to his possible wrongdoing. Even guilty defendants may be justified in seeking damage if they have been physically abused by police officers in the course of an otherwise valid arrest. The dissenting opinion also stated that it is in the public's interest to provide a remedy when officials act improperly (the right to sue in federal courts) and that this interest outweighs the possible burden to the public of paying the cost to defend public officials against frivolous claims that have no merit.

Why these Cases Matter Today

The idea of legal procedures following due process of law dates back to the Magna Carta signed by King John of England in 1215. If the government is going to place a burden on someone, fair procedures must be followed. This is true whether the person will lose his life (death penalty), liberty (go to jail or prison), or property (pay a fine, lose land or home). Due process protects citizens from a government that could otherwise act arbitrarily in depriving citizens of basic rights. The case of Mr. Vachon demonstrates that the government must prove that the accused person must be directly linked with a crime. The case of Mr. Rumery shows that a voluntary relinquishment of a right such as the right to sue will be upheld by courts as long as the person who gives up some of his rights does so voluntarily. Be sure you know what you sign if you are giving up any of your constitutional rights!

The Attorney General and the Communists

The First Amendment states that "Congress shall make no law … abridging the freedom of speech." Does this protect speakers who support the overthrow of the United States government by force? Or can Congress and state legislatures pass laws that regulate subversive activities and make it illegal to give a speech that promotes subversive activity? May committees of Congress and or the state legislatures require individuals to give them information even if these people invoke their Fifth Amendment rights? And send those individuals who refuse to cooperate to jail for contempt? All of the questions and more regarding the interpretation of the First and Fifth Amendments were considered by the US Supreme Court in numerous cases during the 1950s and 1960s These cases arose as a result of hearings held to inquire into the nature and extent of subversive activities in this country.

Background

During World War II, the United States was allied with the Soviet Union, but immediately after the war, many Americans were concerned about the Soviet expansion into Central Europe. They feared that the Soviets were intent on not only expanding in Europe and Asia but were planning to take over the United States as well. In 1945, the US House Un-American Activities Committee (HUAC) became a standing committee; it had previously been a temporary investigating committee. Several laws were passed dealing with subversion at the national level and presidents issued executive orders to determine the loyalty of federal employees. HUAC held numerous hearings exploiting the then new communications media, television. The most spectacular hearings were probably those dealing with the alleged Communist threat to Hollywood and the motion picture industry. The sentencing of Alger Hiss and the start of the Korean War in 1950 added to people's fears of the Communist threat.

The New Hampshire Response

In 1951, the New Hampshire Legislature passed a law to regulate subversive activity in this State. Persons deemed "subversive" were made ineligible for state employment and ineligible to run for election to any public office. This included teachers and others employed in public education. Loyalty oaths were required for present and future government employees and holders of elective offices. Two years later the Attorney General was authorized to act as a one person committee to investigate the extent of subversive activities in the State, to report to the legislature on his findings, and to give them any recommendations he might have for additional legislation to deal with the problem.

Penalties were included in the 1951 law for people who knowingly and wilfully participated in any act to overthrow, destroy or alter the form of government in the United States or New Hampshire and its subdivisions. Persons found guilty of these charges or other violations of this act could be fined $20,000 and/or imprisoned for twenty years. Merely being a member of a subversive organization after November 1, 1951, could result in a $5,000 fine and/or imprisonment for five years.

The College Professor and the Attorney General

Paul M. Sweezy
v.
State of New Hampshire by Louis C. Wyman, Attorney General

Petitioner:	*Paul M. Sweezy*
Respondent:	*State of New Hampshire*
Citation:	*354 US 234*
Lawyers:	*Thomas I. Emerson,* *Louis C. Wyman*
Started:	*January 5, 1954*
Decided:	*June 17, 1957*
Who Won:	*Paul Sweezy*
Decision:	*3–2–2*
Opinion:	*Chief Justice Warren*

On January 4, 1954, Paul M. Sweezy testified before the Attorney General, Louis C. Wyman. Mr. Sweezy willingly testified about his military service during World War II and his past activities, denying he had ever been a member of the Communist Party or that he had ever been part of a program to overthrow the government by force or violence. Mr. Sweezy refused to answer questions that he believed violated the limitations of the First Amendment. He did not claim protection under the Fifth Amendment.

Mr. Wyman again summoned Mr. Sweezy to testify on June 3, 1954. Mr. Sweezy again refused to answer questions about the Progressive Party, the Progressive Citizens of America, and about a lecture Mr. Sweezy had given to a humanities class at the University of New Hampshire on March 22, 1954. Mr. Sweezy had given the lecture at

80

the request of the faculty teaching the course including Professor Gwynne Harris Daggett of the English Department. Mr. Sweezy had addressed classes the two previous years on the same basis.

Contempt of Court?

Based on his refusal to answer the questions, the Attorney General filed a motion in the Superior Court to force Mr. Sweezy to answer the questions. This court held a hearing at which the judge considered the transcript of the two hearings held by the Attorney General, exhibits that were introduced at the hearings, briefs and arguments by the opposing attorneys. The judge decided that Mr. Sweezy had to answer some of the questions; he refused, was found in contempt of court and sentenced to the county jail until he was purged of contempt. Pending an appeal, he was released on $1,000 bail.

This appeal to the NH Supreme Court was heard on January 3, 1956 and decided on March 6, 1956. The NH Supreme Court affirmed the Superior Court's decision. In their opinion, the justices said in part, "The right to lecture and the right to associate with others for a common purpose, be it political or otherwise, are individual liberties guaranteed to every citizen by the State and Federal Constitutions but are not absolute rights" (100 NH 113). They further stated that "Any stultifying effect which the investigation may have upon freedom of expression or any restriction which it may impose upon freedom of association will be in the limited area in which the legislative committee may reasonably believe that the overthrow of existing government by force and violence is being or has been taught, advocated or planned, an area in which the interest of the State justifies this intrusion upon civil liberties" (100 NH 114).

Supported by the Academic Freedom Committee of the American Civil Liberties Union, Mr. Sweezy pursued his appeal to the US Supreme Court. That decision was announced on what has been called "Red Monday" (Oxford, 1992, p. 172), June 17, 1957. It was one of several decisions that imposed restraints on both Congressional and state legislative committees as well as on executive actions regarding the loyalty of employees. In the majority opinion, Chief Justice Warren states that to impose restraints on what can be taught at a university would be detrimental to the country's future. Additionally, the Court found that Mr. Sweezy's right to associate for political expression had been violated by the questioning about the activities of the Progressive Party and its predecessors. The Court said that the New Hampshire Legislature had given the Attorney General such a broad mandate that there was no certainty that the legislature even wanted to know anything about the Progressive Party. Therefore, Mr. Sweezy's rights under the due process clause of the Fourteenth Amendment had been violated.

World Fellowship, Inc.

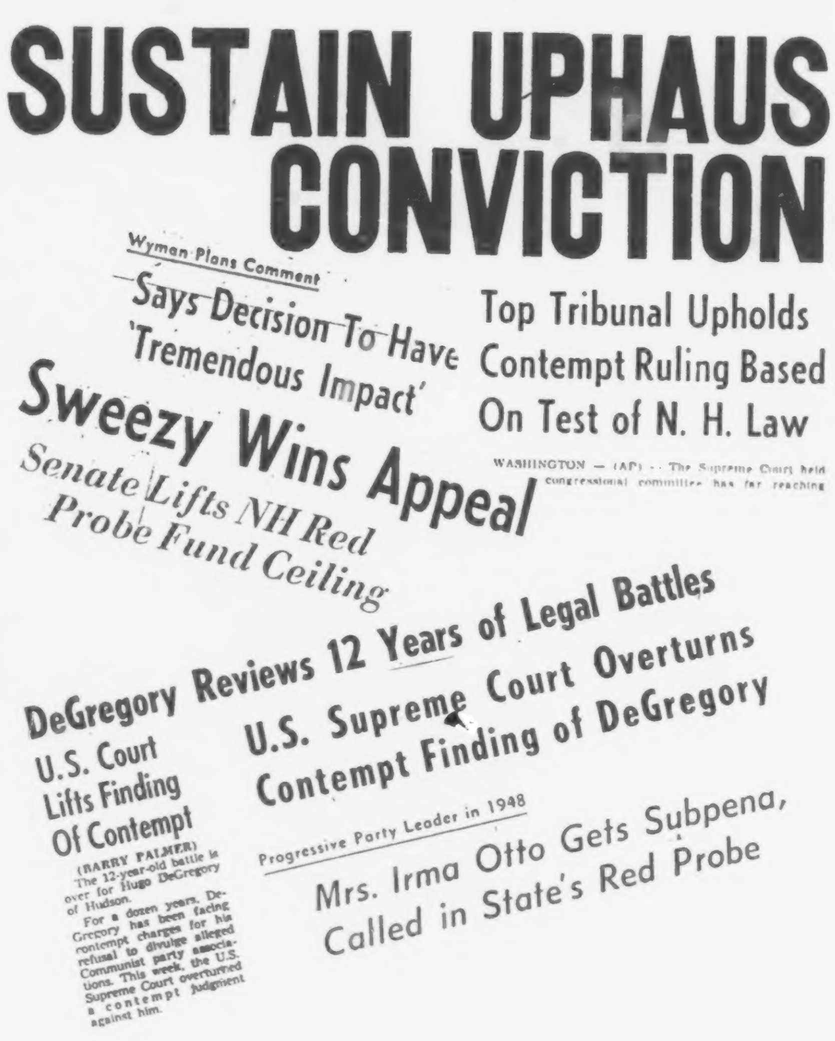
Willard Uphaus was the executive director of the World Fellowship, a voluntary organization that maintained a summer camp in New Hampshire. Subpoenaed by the state's Attorney General as part of the ongoing investigation of possible subversive activities, Mr. Uphaus testified on September 27, 1954, about his own activities. Called again on August 31, 1955, he refused to give the Attorney General certain corporate records for 1954 and 1955. He said that to turn over the records would be a violation of his freedom of religion, speech and assembly and that the request to do so exceeded the powers given to the Attorney General by the legislature. He again refused to produce the documents when ordered to do so by the Merrimack County Superior Court. By the time his appeal reached that level, one document was found to be irrelevant to the inquiry, that document being a list of all the camp's non-professional employees. Mr. Uphaus was found in contempt of court for refusing to give the court a list of all persons who attended the camp during the summers of 1954 and 1955.

Willard Uphaus
v.
Louis C. Wyman, Attorney General,
State of New Hampshire

Petitioner:	*Willard Uphaus*
Respondent:	*Louis C. Wyman*
Citation:	*360 US 72*
Lawyers:	*Royal W. France,* *Leonard B. Boudin,* *Louis C. Wyman*
Started:	*September 27, 1954*
Decided:	*June 8, 1959*
Who Won:	*Louis C. Wyman*
Decision:	*5–4*
Opinion:	*Justice Clark*

The NH Supreme Court upheld the Superior Court's rulings and the case was appealed to the US Supreme Court. Mr. Uphaus's lawyers said that since the US Congress had passed an amended version of the Smith Act in 1956, the New Hampshire Subversive Activities Act had been superseded. They also argued that he was protected from having to produce the documents by the due process clause of the Fourteenth Amendment.

The US Supreme Court, in ruling against Mr. Uphaus, decided that



SUSTAIN UPHAUS CONVICTION

Wyman Plans Comment

Says Decision To Have 'Tremendous Impact'

Top Tribunal Upholds Contempt Ruling Based On Test of N. H. Law

WASHINGTON — (AP) — The Supreme Court held congressional committee has far reaching

Sweezy Wins Appeal

Senate Lifts NH Red Probe Fund Ceiling

DeGregory Reviews 12 Years of Legal Battles

U.S. Court Lifts Finding Of Contempt

(BARRY PALMER)
The 12-year-old battle is over for Hugo DeGregory of Hudson.

For a dozen years, DeGregory has been facing contempt charges for his refusal to divulge alleged Communist party associations. This week, the U.S. Supreme Court overturned a contempt judgment against him.

U.S. Supreme Court Overturns Contempt Finding of DeGregory

Progressive Party Leader in 1948

Mrs. Irma Otto Gets Subpena, Called in State's Red Probe

Concord Daily Monitor, June 10, 1953, p. 1. *Manchester Union Leader*, June 18, 1957, p. 1. *Nashua Telegraph*, April 4, 1966, p. 1. April 9, 1966, p. 1. *Manchester Union Leader*, June 9, 1959, p. 1, December 30, 1953, p. 1.

BEST COPY AVAILABLE

the federal law did not supersede the state law; the State has a legitimate interest in investigating sedition against the State. The decision also reiterated the right of the sate government to require a corporation chartered by the State to produce papers to determine if the corporation is acting in violation of state policy. The request to produce a list of names was not seen as being an unreasonable burden on Mr. Uphaus as the list included only about 300 names each year.

Because Mr. Uphaus had participated in Communist front activities and because at least nineteen speakers at the World Fellowship were either members of the Communist Party or connected with other subversive organizations, the Court ruled that the New Hampshire government had justification to investigate the World Fellowship to see if it posed a serious threat to the security of the State. The camp was a public one, required by state law to maintain a register of guests that was open to inspection by law enforcement officers (just as hotels keep). Therefore, although the rights of guests to associate with others in privacy would be violated by making the guest list available to the Attorney General and ultimately to the public through his reports to the legislature, the Court ruled that the government's interest in preserving itself was more important. The majority of the Court affirmed decisions by the lower courts. Mr. Uphaus served a year in jail.

Eleven Years and Nine Months

From July 12, 1954 when Hugo DeGregory of Hudson, New Hampshire first appeared before Attorney General Louis Wyman, until April 4, 1966 when the US Supreme Court issued its third decision, this case was almost continuously being appealed in some court. Various issues involving the repeated questioning of Mr. DeGregory, his subsequent jailings for contempt of court and grants of immunity came before the NH Supreme Court seven times and before the US Supreme Court three times.

At the initial hearing, Mr. DeGregory said in a prepared statement that the law authorizing the investigation was unjust and unconstitutional. By November of the next year, Mr. DeGregory was using his right to be free from self-incrimination when asked to answer questions about Communist Party activity. Granted immunity from prosecution by the Superior Court without any notice or hearing, Mr. DeGregory continued to refuse to answer questions. Sentenced to jail, Mr. DeGregory had his jail term suspended and bail set until the constitutional issues could be decided. Early in 1957, the NH Supreme Court heard arguments in the case but ordered rearguments later that same year in light of the June announcement from the US Supreme Court in the Sweezy case. The NH Supreme Court ruled that if a person is given immunity, the Fifth Amendment (US Constitution) and Fifteenth Article (NH Constitution) protections no longer apply.

Hugo DeGregory
v.
Attorney General of the State of New Hampshire

Petitioner:	*Hugo DeGregory*
Respondent:	*Attorney General William Maynard*
Citation:	*383 US 825*
Lawyers:	*Howard S. Whiteside,* *R. Peter Shapiro*
Started:	*November 2, 1955*
Decided:	*April 4, 1966*
Who Won:	*Hugo DeGregory*
Decision:	*6–3*
Opinion:	*Justice Douglas*

A New Law, and it Starts Again

The New Hampshire Legislature renewed its investigation into subversion in the State with a law worded slightly differently in the 1957 session. Subpoenaed to appear before the Attorney General again on February 2, 1960, Mr. DeGregory again refused to answer whether he was presently a member of the Communist Party. Again granted immunity, he continued to refuse, was found in contempt, sentenced to jail and bailed pending appeal. The NH Supreme Court upheld the lower court. He was found to be in contempt of court for not answering the question, despite the assurance that he would not be prosecuted for his answer. Immunity from state prosecution does not, however, mean immunity from prosecution under federal laws on the same topic.

Finally heard by the US Supreme Court on February 24, 1966, Mr. DeGregory's case resulted in a reversal of the decisions by the New Hampshire courts. Justice Douglas in writing for the majority said that since Mr. DeGregory willingly testified that he had not been a Communist since the law was passed in 1957, therefore the First Amendment did indeed protect him from answering questions about what happened before 1957. He further said that the "staleness of both the basis for the investigation and its subject matter makes indefensible such exposure of one's associational and political past – exposure which is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval ... The information being sought was historical, not current" (383 US 829).

Why Mr. DeGregory?

Why was Mr. DeGregory regularly called before the Attorney General during these investigations when others were not? One clue to the reasons may be found in Mr. Wyman's 1955 report. "A long time Communist Party official, Hugo DeGregory, currently of Hudson, New Hampshire, may currently be the power behind the Party in this State" (New Hampshire Attorney General, 1955, p. 9). Mr. DeGregory was jailed three times before ultimately winning his case in the US Supreme Court.

The Extent of Communism in the State

Just how extensive and influential *was* the Communist Party in New Hampshire? Attorney General Louis C. Wyman in his 1955 report to the legislature states that at some time over the years 131 individuals were identified by his investigations as Communist Party members (New Hampshire Attorney General, p. 9). During the period 1928–1946, when the Communist Party was listed on the ballot for general elections in the State, candidates received between 200 and 300 votes statewide (New Hampshire Attorney General, p. 10). Estimates prepared by the FBI gave the total membership in New Hampshire at any given time at 50 people.

Conduct of the New Hampshire Investigations

During the period between 1953 and January of 1955, Attorney General Wyman and his staff interviewed 130 people. Most of the interviews, unlike the McCarthy hearings in Washington, D.C., were held in private. On occasion, transcripts of the hearings were released after the session. In his written report, Wyman lists the names and available information on those individuals who exercised their privilege against self-incrimination when called to testify, and those with current Communist or pro-Communist affiliations. Rules of Procedures were written and explained to witnesses prior to any hearing. Because these hearings were a legislative investigation, any possibility of contempt for refusal to answer questions had to be heard by a Superior Court judge, in Merrimack County for convenience.

Why these Cases Matter Today

Both state and national governments may conduct investigations to protect the government from subversion; individuals however still have constitutionally protected rights during those investigations. Academic freedom is protected by the First Amendment and governments must respect a person's freedom to freely associate with others for political reasons.

Fugitives from Justice

If a person commits murder and escapes detection but is later found living in another State, what happens? Based on Article Four, section 2, clause 2 of the US Constitution, the executive authority (usually the governor) of the State where the crime was committed may demand to have the suspect returned to stand trial. The State where the alleged criminal is currently living must deliver him to the requesting State. For a crime such as murder this seems obvious but most cases do not involve murder and are seldom straightforward. Suppose the requesting governor sends paperwork containing errors. Suppose the person accused could not logically commit the crime with which he is charged. Suppose the accused is from a foreign country. Is the governor receiving a request obliged to turn the person over to the requesting State or country?

A Question of Forged Wills

Munsey
v.
Clough

Petitioner:	*Martha S. Munsey*
Respondent:	*Sheriff Clough*
Citation:	*196 US 364*
Lawyers:	*Edward A. Lane, Edwin G. Eastman and George A. Sanderson*
Started:	*February 1902*
Decided:	*January 30, 1905*
Who Won:	*Sheriff Clough*
Decision:	*9–0*
Opinion:	*Justice Peckham*

Martha Munsey, living in Pittsfield, New Hampshire, was indicted in Middlesex County, Massachusetts, on three charges of the crime of uttering forged wills during the period between May 1895 and February 1902. The governor of Massachusetts sent a request to the governor of New Hampshire asking that Ms. Munsey be returned to stand trial. Although there was a clerical error in the accompanying paperwork (A clerk had mistakenly written that the grand jury met in February 1892 instead of February 1902), the governor issued a warrant for her arrest. The warrant was addressed to the sheriff of Merrimack County, Mr. Clough, instead of being addressed to Jophanus H. Whitney, the person appointed by the Massachusetts governor to convey Ms. Munsey back to Massachusetts.

Ms. Munsey's attorneys, Edward A. Lane and the firm of Sargent,

88

Niles & Morrill, filed a writ of *habeas corpus* challenging the decision of the New Hampshire governor to send Ms. Munsey back to Massachusetts. A trial was held in Merrimack County Superior Court during the April, 1902 term and the verdict appealed to the NH Supreme Court where a decision was given on December 27, 1902. This court ruled that none of Munsey's rights as a citizen had been jeopardized and that therefore they were justified in denying her motion for a discharge. The following June the same court ruled that Munsey's rights were not violated because the governor of New Hampshire had refused to hear her on the subject of whether she was a fugitive from justice. At the April 1902 trial in Superior Court, she had waived the right to offer evidence showing that she was not a fugitive. She did not have the right, the court ruled, to personally address the governor.

Ms. Munsey appealed the verdict to the US Supreme Court where the case was heard on January 13, 1905 and the decision given on January 30, 1905. Justice Peckham for a unanimous court affirmed the NH Supreme Court's decision.

Murder, Conspiracy and Insanity

Drew, Sheriff of Coos County, State of New Hampshire
v.
Thaw

Petitioner: Mr. Drew
Respondent: Harry K. Thaw
Citation: 235 US 432
Lawyers: William Travers Jerome, Franklin Kennedy, James A. Parsons, P.C. Knox, William A. Stone, Merrill Shurtleff, & George Morris
Started: August 17, 1913
Decided: December 21, 1914
Who Won: Mr. Drew
Decision: 9–0
Opinion: Justice Holmes

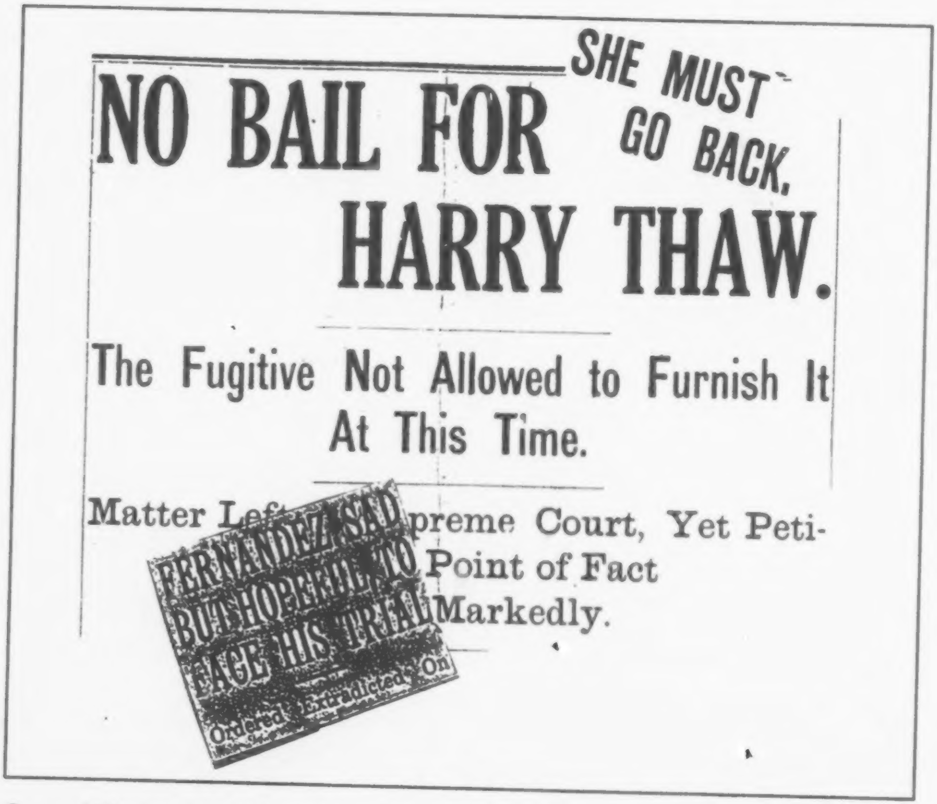
A few years later the governor of New York requested the extradition of Harry Thaw. Mr. Thaw had been confined to the Matteawan Asylum for the Criminal Insane in New York after being found not guilty by reason of insanity in a scandalous murder case.

Evelyn Nesbit was a beautiful 16-year-old model when she met Stanford White in 1901. White, a prominent New York architect who was considerably older, and already married with one son. White contributed to financing shows and musical productions in New York and had a private apartment where he entertained young women whom he met in the theaters and nightclubs.

Nesbit and White became lovers.

Harry Thaw, a wealthy eccentric bachelor from Pittsburgh, came to New York, saw Evelyn and fell in love. In 1905 Evelyn and Harry were married. Thaw became obsessed with White and his treatment of Evelyn prior to the marriage. He paid private detectives to follow White and report on all his activities. On June 25, 1906, Thaw, Nesbit and White all happened to be at the Roof Garden, a club atop Madison Square Garden, a building that had been designed by White. They were all attending a new show. On the way out, Thaw pulled out a revolver and shot White three times, killing him instantaneously with one bullet going through the left eye, and one through his left nasal cavity. Both these bullets lodged in his brain. Thaw emptied the rest of the bullets from the chamber of the gun and was still at the scene when police arrived. Three days later Thaw was arraigned for murder and held without bail at the Tombs prison.

The trial began on January 23, 1907 with District Attorney William



SHE MUST GO BACK.

NO BAIL FOR HARRY THAW.

The Fugitive Not Allowed to Furnish It At This Time.

Matter Left [illegible] preme Court, Yet Peti-
[illegible] Point of Fact
[illegible] Markedly.

FERNANDEZ SAD BUT HOPEFUL TO FACE HIS TRIAL

Ordered Extradicted; On

Concord Monitor, April 14, 1914, p. 1, May 26, 1925, p. 1. *Concord Evening Monitor*, December 29, 1892, p. 1.

Travers Jerome as prosecutor. Thaw's mother spared no expense to hire the best possible attorneys to defend her son. The first one hired recommended that the insanity plea be used; Thaw refused. A new defense team was hired consisting of John B. Gleason and Delphin Michael Delmas who reportedly received between $50,000 and $100,000. Huge crowds came to the court each day; more than 100 reporters covered the proceedings. It took eight days to pick the 12 jurors from the 336 questioned. Thaw's attorneys pleaded that he was temporarily insane at the time of the murder.

Evelyn Nesbit Thaw agreed to testify in support of her husband. This necessitated her recounting her experiences with Stanford White, which included instances of violence as well as sex. This testimony was considered by many people to be so shocking that they thought it should not be published in newspapers and a resolution was even suggested in the US Congress that the US Post Office not allow any newspaper or magazine containing accounts of her testimony to be sent through the mails. (This did not happen; reporters continued to regale their readers with all the details.)

Even with a recess of a few days due to the illness and death of the wife of one of the jurors, the trial was over in 12 weeks. After 47 hours of deliberation, on April 12, the jury was hopelessly deadlocked. Seven members believed Thaw was guilty of murder in the first degree, the other five voted to acquit him by reason of insanity.

Round Two

The second trial began on January 6, 1908, with the same prosecutor but a new defense team of Martin W. Littleton and A. Russell Peabody. This time 372 jurors were questioned before 12 jurors were selected. On February 1, 1908, Harry K. Thaw was found not guilty by reason of insanity and he was committed to Matteawan Asylum for the Criminal Insane. During the next five years, there were at least four attempts to win his release.

On August 17, 1913, Thaw escaped from Matteawan by walking through a gate that had been opened for a milk truck. Two cars were waiting for him and he was swiftly driven to Canada. Forcibly removed from that country as an undesirable alien, he was located in Coos County, New Hampshire in September of that year. New York requested that New Hampshire return Thaw to be tried for the crime of conspiracy to pervert and obstruct justice and the due administration of the law. New Hampshire Governor Felker complied and Mr. Drew, sheriff of Coos County, arrested Thaw in Colebrook. Thaw was transported to Concord, where he was confined to the Throne Room at the Eagle Hotel, across the street from the State House. There he was guarded by Sheriff Drew, US Marshal Nute and Officer Clark Stevens of the Concord Police Department.

In US District Court in Concord, Thaw's attorney, Joseph A. Donigan, argued that insane people are not capable of having a criminal intent; since Mr. Thaw had been found insane, he was incapable of committing a crime. Following this line of reasoning, a person incapable of committing a crime cannot be extradited since there is no basis for the arrest warrant. Judge Edgar Aldrich also considered the fact that Thaw had been found not guilty of murder. In his opinion, he said in part, "So we have the case pure and simple, and that is all there is of it, a person sought to be extradited under the Constitution because he has fled the guardianship custody based upon the verdict of a jury that he was insane" (Aldrich, 1914, p. 5). Judge Aldrich therefore granted Thaw's writ of *habeas corpus*. Thaw, however, was kept in custody without bail while the case was appealed to the US Supreme Court.

At the US Supreme Court, attorneys for Sheriff Drew argued that it was not the responsibility of the New Hampshire governor to decide whether Mr. Thaw was or was not capable of committing a crime in New York. In his opinion for the unanimous court, Justice Holmes agreed. He said " ... it is a question as to the law of New York which the New York courts must decide" (235 US 440). The court ruled "We regard it as too clear for lengthy discussion that Thaw should be delivered up at once" (235 US 440). Thaw was returned to Matteawan where he remained until June 1915. He was found sane at a hearing and released on July 15, 1915.

Embezzlement of Public Money

Justice Holmes was also the author of a US Supreme Court opinion on the extradition of Mariano Viamonte Fernandez from New Hampshire to Mexico. Mr. Fernandez was the Cashier in the Mexican Department of Special Taxes and as such had sole charge of the money and was responsible for keeping the books. When the books showed a considerable amount of money missing (about $65,000), Mr. Fernandez, alleged to be a gambler, fled the country. He was located in New Hampshire where he owned a home in Newton, and Mexico requested his extradition. Unlike Mr. Thaw, Mr. Fernandez was held at Merrimack County Jail.

Lawyers for Mr. Fernandez objected to the extradition on a number of grounds including the idea that embezzlement was not covered by the treaty between the United States and Mexico that governs extradition between the two countries. They also argued that there was insufficient evidence and that the defendant's name was given two different ways on the warrant.

The unanimous court ruled against Mr. Fernandez saying that there was competent evidence available that identified Mr. Fernandez and that embezzlement was covered by the treaty. They said, "We are of the opinion that probable cause to believe the defendant guilty was shown by competent evidence and that the judgment remanding the appellant must be affirmed" (268 US 314). Mr. Fernandez was returned to Mexico.

Fernandez
v.
Phillips, US Marshal

Petitioner:	*Mario Viamonte Fernandez*
Respondent:	*Mr. Phillips*
Citation:	*268 US 311*
Lawyers:	*John E. Benton, Robert W. Upton, Edward C. Niles, Harold B. Elgar, Jerome S. Hess*
Started:	*Unknown*
Decided:	*May 25, 1925*
Who Won:	*Mr. Phillips*
Decision:	*8–0*
Opinion:	*Justice Holmes*

Why these Cases Matter Today

All the cases involving fugitives from justice demonstrate two important concepts. First, a person who commits a crime cannot move to another location to escape justice. This helps to deter crimes. Secondly, someone accused of a crime cannot be taken from one State or country to another without due process of law. That person must be properly identified and given an opportunity to show why he/she should not be delivered to the authorities in another State or country. In our history as a nation there have been times when a governor has refused to extradite someone. For example, before the Civil War, northern governors refused to extradite those accused of assisting slaves who were trying to escape. As late as 1950, one of the "Scottsboro boys" was still protected by Governor Williams' refusal to extradite him from Michigan. The US Supreme Court ruled in 1987 (*Puerto Rico v. Branstad* 483 US 219) that governors no longer have this discretion, but the procedures requiring due process remain to protect the individual.

Mr. Coolidge and the Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourth Amendment to the US Constitution

Murder in Manchester

Coolidge
v.
State of New Hampshire

Petitioner:	*Edward H. Coolidge, Jr.*
Respondent:	*State of New Hampshire*
Citation:	*403 US 443 (1971)*
Lawyers:	*Archibald Cox,* *Alexander Kalinski*
Started:	*February 19, 1964*
Decided:	*June 21, 1971*
Who won:	*Coolidge*
Decision :	*9–0*
Opinion:	*Justice Steward*

It was a dark and stormy night. Pamela Mason, age 14, went to babysit and never returned home. She had received a phone call earlier that day from a man responding to the ad she had posted in a laundromat near her home in Manchester. Despite her mother's instructions that she was only to go babysit if the man's wife picked her up, Pamela went with the unknown stranger at 5:45 that afternoon of January 13, 1964. It snowed heavily that night, 11 inches, and when Pamela's mother returned home from work late that night she wasn't concerned about Pamela's absence. She often stayed overnight with friends.

The next morning, however, Mrs. Mason called West High School and found that her daughter had not shown up for school. She called the Manchester Police and the search started. By Thursday, January 16, the State Police had been called in and the *Manchester Union Leader* was comparing the case to that of Sandra Valade, a teenager who had been murdered in 1960. That murder was never solved.

On January 22, a bakery truck driver discovered Pamela's body lying alongside Interstate 93 in Manchester. Two days of heavy rains had washed away the snow and revealed a darkly clothed corpse. She had been stabbed four times and shot in the head twice.

The New Hampshire Attorney General, William Maynard, took personal charge of the investigation. The investigators used detectives from all over the State; 50 police officers searched the sides of I–93 and went door to door asking questions. Evidence was sent to the New York City Medical Examiner, the autopsy was performed by a pathologist from Harvard, and clothing and other evidence was sent to an expert at the University of Rhode Island. 38 state troopers were assigned to the hunt for the killer and an FBI agent from Boston was called in to help.

Having learned from a neighbor that Edward Coolidge, Jr. had been away from home on the night of the murder, the police questioned him on January 28. Asked about any guns he owned, Coolidge produced two shotguns and a rifle. He was asked to take a lie detector test. Coolidge agreed to take one on Sunday, his day off. During the examination, Coolidge admitted to stealing $300 from his employer. While he was held at the station, two police detectives went to the Coolidge home in Manchester. They asked Mrs. Coolidge about the theft and also about the Mason murder. During their questioning, they asked Joann Coolidge if her husband had any guns in the house. She agreed to let the detectives take the two shotguns and two rifles kept in the bedroom closet. As the officers were leaving at 11:15 that night they asked Mrs. Coolidge if they could look in the two cars parked in the driveway. She consented, gave them the keys, and the detectives searched the 1963 Chevrolet convertible and the 1951 Pontiac two-door sedan, taking some items with them.

Investigation and Arrest

On February 19, four search warrants were issued by Attorney General Maynard. The Attorney General, acting as a Justice of the Peace, signed the warrants after Manchester Police Chief Francis McGranahan signed the applications for warrants and swore to them under oath. The warrants authorized the searches of 312 Seames Drives (Coolidge's home), the laundromat at 712 Valley Street, and the two Coolidge automobiles. Arrest warrants were also issued for Edward H. Coolidge, Jr. and he was arrested that day at 8:00 p.m. The house was searched on the following day, and the cars on the 21st.

Coolidge was held without bail while the prosecutors presented evidence to a special session of the Grand Jury. Coolidge was indicted on two counts – first degree murder and kidnapping. He pleaded not guilty to both counts. He was also later indicted for the murder of Sandra Valade.

Jury selection began on May 17, 1965 in Manchester. 100 prospective jurors, four of them women, were called. Many were dismissed because they opposed capital punishment. The all-male jury finally chosen was sequestered for the entire trial at the Carpenter Motor Hotel. The jury received $10 per day plus meals, but were denied radio, television, and newspapers. The trial was held six days a week, including Memorial Day.

The Trial

Attorney General Maynard opened the State's case on May 26. During the three weeks of testimony, witnesses testified to having seen Coolidge arrive home on the night of the murder with his pants wet up to the knees. They also testified that Coolidge had requested help in making up an alibi. Coolidge admitted that he had stopped his car near the place where Mason's body was found. He claimed that his car was stuck in the snow, but two witnesses who had stopped to offer help testified that the car wasn't stuck. The State also presented scientific evidence. A new technique, neutron activation analysis, was used on particles and hair found in the 1951 Pontiac. Vacuum sweepings had picked up particles of gun powder. The State claimed the particles found in the car made it likely that Pamela Mason had been there. The defense presented its own witnesses to challenge the reliability of the test. The State also presented the .22 caliber Mossberg rifle belonging to Coolidge that it claimed was the murder weapon. There was conflicting ballistics testimony about whether the bullets found in Pamela Mason's body had come from this gun. Finally, the prosecution introduced vacuum sweepings taken from clothes at the Coolidge house during the search, and attempted to show that there was a high probability that the clothes had been in contact with Pamela Mason's body.

Finally on June 18, Coolidge testified, admitting that he had told police several versions of his actions on the night of the murder. He explained that he was nervous because he didn't have an alibi for every minute and that he had been questioned several years before about the Sandra Valade murder. Joan Coolidge also testified that her husband's rifle (allegedly the murder weapon) had been in the closet the entire night.

A crowd of 500 outside the courthouse shouted "murderer," "animal," and "hang him" as the jury deliberated. The jury was out only four hours and 15 minutes before returning its guilty verdicts. Since they didn't add "with capital punishment" to their verdict, Coolidge was immediately sentenced to life in prison. After the convictions,

the Attorney General dropped the Valade murder charges.
The NH Supreme Court affirmed the convictions on June 30, 1969, and an appeal to the US Supreme Court followed.

". . . no warrants shall issue . . . "

What is the purpose of the Fourth Amendment? The framers of the Bill of Rights had experienced the arbitrary searches of King George III (actually the searches were done by his soldiers and customs officers). They did not want the new federal government to be able to conduct the same unrestricted searches as the King had. The Fourth Amendment requires the government to obtain a search warrant before searching a person, his house, or his property. A warrant is obtained by demonstrating to a person who is authorized to issue warrants that there is probable cause to believe that a crime has been committed and that evidence of that crime may be found in a particular place. The police officer seeking the warrant must swear to the truth of the facts presented. The Supreme Court has, however, over the years interpreted the Fourth Amendment as only prohibiting "unreasonable" searches and has carved out several exceptions to the warrant requirement, as we will see below.

"... a neutral and detached magistrate ..."

Coolidge had challenged the search warrant issued by Attorney General Maynard, since a search warrant must be issued by a "neutral and detached magistrate," meaning a judge who is not tied to the police department or to the investigation. The law in New Hampshire then allowed the issuance of a warrant by any Justice of the Peace. Since nearly anyone can become a Justice of the Peace in New Hampshire (it only requires an application to the Secretary of State, a filing fee, and approval by the Governor and Executive Council), most police departments obtained a warrant from a police officer in the department. The Manchester Police Chief testified in court that his department always asked Captains Couture, Shea, or Loveren to issue any search warrants they needed.

Coolidge argued, and the Court agreed, that the purposes of the Fourth Amendment were circumvented if the investigators could decide, on their own, whether to issue a warrant. Quoting Justice Felix Frankfurter the Court held,

> *"The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. ... The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned ..."*
>
> (403 US 454)

It was clear to the Supreme Court that a warrant had to be issued by a judge who had no part in the investigation and was not an employee of the police department. The Court spent relatively little time disposing of the State's arguments on this point and quickly found that the warrants issued by Attorney General Maynard were invalid. That meant that the 1951 Pontiac had been seized and searched without a warrant. And that meant that the State would have to justify its search some other way.

Exceptions to the Rule

In law, almost every rule has its exceptions and the Fourth Amendment is no exception. Despite the clear language requiring a warrant in order to search, the US Supreme Court has created exceptions to the rule over the last two centuries. The State argued to the US Supreme Court that the search of Coolidge's Pontiac, even without a warrant, was still legal because it fell under some of the exceptions. To be safe, the State argued three different theories.

". . . incident to arrest . . . "

The State's first theory was that the Pontiac had been seized "incident" to a valid arrest. Coolidge was arrested at his house at the same time as the car was taken and towed away by the police. The exception to the warrant requirement for a search "incident to arrest" is based on the concern that a person being arrested might try to grab a weapon and harm the arresting officer or might try to grab some evidence and dispose of it (for example, swallow drugs). Therefore, police officers are allowed to search a person being arrested and the immediate area around that person.

Since Coolidge was arrested inside his house and the car was (obviously) outside, it wasn't in Coolidge's "immediate vicinity." Moreover, the car wasn't searched until two days later. The Court had little trouble in disposing of this argument by the State.

"The Automobile Exception"

Since the days of Prohibition when a bootlegger's car was stopped and searched, the US Supreme Court has held that automobiles were a different kind of property. The exception was based on the fact that cars have wheels and engines and can be easily moved from the scene of the police stop. In other words, there may not be time to get a warrant before the car and its contents are gone. Over the years this has led to many difficult, convoluted, and inconsistent decisions by the courts, and the rules regarding car searches are still not clear today. In Coolidge's case, however, the Court had little trouble holding that the exception did not apply to a parked car. There were various reasons why the search of Coolidge's car was different from the usual case of a car stopped on the highway. Here the police had been investigating Coolidge for two weeks and he knew it. Therefore, he had plenty of time to remove incriminating evidence from the car. The opportunity to search the car was not a "fleeting" one such as a highway stop. Moreover, once Coolidge was arrested and taken to the police station and his wife and child were made to leave the house, police officers remained to guard the house. Therefore this was a situation where a valid warrant could have been obtained to search the car. "Automobile" is not a magic word that does away with the warrant requirement.

". . . in plain view . . . "

The State's last theory was that the Pontiac could be seized "because it was in plain view." The police may seize evidence if it is in plain view during a legitimate search. An example of this would be a search with a warrant that allows the police to search for stolen checks. While searching a desk, the police came across packets of drugs. Even though their warrant was for checks, the drugs were in plain view during the search and could be seized. Another example would be the police officer who, while asking for a driver's license during a traffic stop, sees a gun on the floor of the car. What the US Supreme Court points out is that in each of these cases the police had a legitimate prior justification for being on the scene. Remember, the idea behind the Fourth Amendment is that the police cannot simply search a person's property because they want to. They must prove to a judge that they have probable cause.

In Coolidge's case, however, the police were at his house without a valid warrant. Plain view alone cannot justify a search without a warrant. *Because* the police knew that Coolidge's car was the object of their search, the fact that it was in plain view doesn't help them. There are two limitations to plain view – the first is that the police search must be legitimate; that is, either with a warrant or fall within one of the exceptions to the warrant requirement. The second limitation is that the finding of the evidence must be inadvertent, that is, accidental. If the police knew, going in, that they were looking for a particular piece of evidence they may not claim that they found it unintentionally and that it was in plain view.

Arrest Warrants

Coolidge was arrested that night without an arrest warrant. It was an undecided question at the time whether or not the Fourth Amendment required a warrant for a person's arrest. The practice at the time was to make the arrest without a warrant. Justice White, in his dissent, argued that if the police can enter a person's house to arrest him without a warrant, then surely it should be all right to search the house without a warrant. Justice Stewart, who wrote the majority opinion, saw the same problem but argued that to agree with Justice White would be to "have read the Fourth Amendment out of the Constitution." Since it appears that the votes weren't there to create a new rule requiring arrest warrants before arresting a man in his house, Stewart saved that issue for another day, writing that it was not necessary to decide in Coolidge's case.

The Court would later rule in another case that warrants are required for arrests in a person's house. However, police officers may still arrest people without a warrant if the officer witnesses the crime or if, in the case of a felony, the officer has probable cause to believe a crime has been committed and the arrest can be made outside the person's home.

Epilogue

After the US Supreme Court had reversed Coolidge's conviction, the case was returned to the Superior Court for a new trial. This time the trial would be held without the tainted evidence obtained from the illegal search. Before a new jury was selected, however, Coolidge and the new Attorney General, Warren Rudman, agreed to a plea bargain. Coolidge pled guilty to Second Degree Murder, instead of the original charge of First Degree Murder, and received a sentence of a minimum 25 years to a maximum of 40 years.

Coolidge was first eligible for parole in 1978, but was rejected by

100

the Parole Board. He was rejected several more times and was eventually moved to a state prison in Virginia where he could enter a minimum security facility. Coolidge was finally paroled in 1991.

Why these Cases Matter Today

Coolidge's case is one of the most important to arise out of New Hampshire. It clarified some very important principles of search and seizure law. The Fourth Amendment and its counterpart in the NH Constitution, Part I Article 19, are your protections against the power of the government to search and arrest you and confiscate your property at will. Unlike most other governments in the world, we have placed limits on the police in order to maintain the privacy of our citizens. Only by constantly challenging the actions of the government, as Coolidge's lawyers did, can we keep our freedoms.

US Supreme Court Justices from New Hampshire

Introduction

Five citizens from New Hampshire have been appointed to the US Supreme Court between 1789 and 1995. Three of these, although born in this State, had spent most of their professional lives in other States. Brief biographies of these three are included, followed by longer biographies for the other two, whose careers were spent in New Hampshire prior to their appointments.

Nathan Clifford

The first to be appointed was Nathan Clifford, who was born in Rumney in 1803. Admitted to the New Hampshire Bar in 1827, he moved to Maine in 1830 and spent the rest of his life there or in Washington, D.C. He was nominated to the Supreme Court by President Buchanan and served from 1858 until 1881, when he died.

Justice Nathan Clifford. Photo by Harris & Ewing, courtesy of the Collection of the Supreme Court of the United States.

Chief Justice Salmon P. Chase. Artist unknown, courtesy of the Collection of the Supreme Court of the United States.

Salmon P. Chase

Salmon Portland Chase was the second to serve and the first to be chief justice. He was born in Cornish in 1808 and after graduating from Dartmouth College, spent most of his career in Ohio. Having served as Secretary of the Treasury

BEST COPY AVAILABLE

under President Lincoln, he was nominated by him to become chief justice in 1864. During Chase's tenure as chief justice, he presided over the impeachment trial of President Andrew Johnson. He died in 1873.

Harlan F. Stone

Called the "New Hampshire Farmer" (Gunther, 1994, p. 557) in the private correspondence of a fellow justice, Harlan Fiske Stone was indeed born on a Chesterfield, New Hampshire farm in 1872. Stone's career prior to becoming a Supreme Court justice was primarily in New York City where he was on the faculty of Columbia Law School and a corporate lawyer. Stone was appointed to the court by President Coolidge in 1925 and served as an associate justice until 1941. In that year he was nominated by President Franklin D. Roosevelt to be chief justice, a position which ended with his death in 1946.

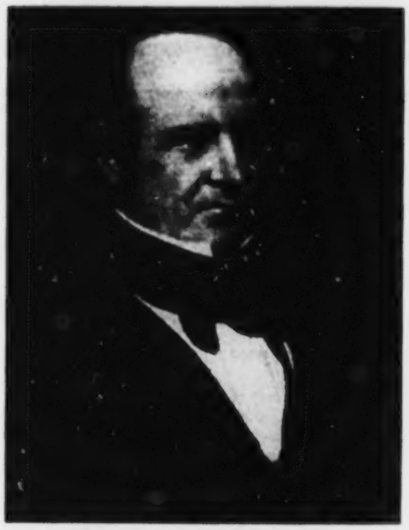
Chief Justice Harlan Fiske Stone. Photo by Harris & Ewing, courtesy of the Collection of the Supreme Court of the United States.

Levi Woodbury

More interested in becoming president than remaining on the Supreme Court, Levi Woodbury died before he could achieve his goal. Although denied his greatest desire, he nonetheless served his country in many roles.

Born in Francestown on December 22, 1789, he was the second of ten children. Levi attended the Francestown Village School and was then sent to Atkinson Academy to prepare for college. He attended Dartmouth College, graduating with honors in 1809. To prepare for a career in law, he studied at the Litchfield, Connecticut, Law School and with Samuel Dana of Boston and Judge Jeremiah Smith of New Hampshire. In 1812 he was admitted to the Bar of the State Circuit Court of Hopkinton and began his practice in Francestown.

Woodbury's interest in politics began early in his life and by the time he was practicing law, he was a supporter of President Madison. By 1816 he was already the clerk of the New Hampshire Senate and the following year he was appointed to the state's highest court, the Superior Court, by Governor William Plumer. Because of his youth, he was called the "baby judge" (Bell, 1894, p. 82).



Justice Levi Woodbury. Photo by Handy Studios, courtesy of the Collection of the Supreme Court of the United States.

Undoubtedly his career was helped by his marriage in 1819 to Elizabeth Williams Clapp and by their establishment of a home in Portsmouth where many leading politicians lived, worked and socialized. It is probable that having a father-in-law who was known as the "richest merchant north of Boston" (Capowski, 1993, p. 147) did not hurt his career in New Hampshire politics either.

Woodbury's career as a state judge ended in 1823 with his election as New Hampshire's governor. Two years later he was elected to the New Hampshire House of Representatives from Portsmouth and was immediately elected Speaker of the House. In June of the same year, he was elected to represent New Hampshire in the United States Senate. Throughout this period and for the rest of his career, Levi Woodbury was known as a very thorough worker who spent many hours researching positions before writing speeches, judicial opinions or reports.

President Andrew Jackson appointed Woodbury as Secretary of the Navy in 1831. One of his first actions was to authorize money payments to sailors in place of the traditional spirit ration (Rantoul, 1851, p. 16). Other actions he took as Secretary were to advise against flogging as a punishment and to practice rotation of officers among the good and bad posts. He also recommended that the navy invest in the new invention, steam ships. When the president nominated Roger B. Taney to become Chief Justice, Woodbury was appointed in 1834 to succeed Taney as Secretary of the Treasury. During his term, his most significant achievement was "The National Debt Was Paid Off" (Rantoul, p. 23). When Harrison was elected president, he resigned and was returned to the US Senate from New Hampshire in March 1841.

BEST COPY AVAILABLE

During the campaign of 1844, Levi Woodbury was seriously considered as a possible vice presidential candidate to run with Polk. He was known as a conservative, states' rights Jacksonian Democrat. Offered the position of ambassador to Great Britain by President Polk, he refused as he had an earlier offer to be ambassador to Spain. Polk, however, did nominate him to the US Supreme Court where he served from 1845 until his death in 1851. Had he lived he might have been a serious presidential candidate in place of Franklin Pierce.

On the court, he continued to be a strong supporter of states' rights and often was part of the majority in the Taney court decisions. For example, he wrote the court's decision in *Jones v. Van Zandt* (5 Howard 215) upholding the constitutionality of the Fugitive Slave Act of 1793.

David H. Souter

Called the "stealth candidate" by the news media, David H. Souter is the most recent New Hampshire resident to be appointed to the US Supreme Court. When President George Bush announced his selection in the press room of the White House on July 23, 1990, most members of the press who were present had no idea what Souter's views were on the important issues of the day particularly his views on a woman's right to an abortion. Naturally, reporters tried to find information about these views prior to hearings held by the Senate Judiciary Committee on his nomination. They were unsuccessful.

Justice David Souter. Photo by Joseph H. Bailey, National Geographic Society, courtesy of the Collection of the Supreme Court of the United States.

Souter was born on September 17, 1939 in Melrose, Massachusetts. By 1950, he and his parents had moved to Weare, New Hampshire. He graduated from Concord High School in 1957 (Weare did not have its own high school at that time), and went to Harvard. Four years later he graduated magna cum laude with a major in philosophy and was elected to Phi Beta Kappa. The next two years were spent on a Rhodes Scholarship to Magdalen College, Oxford.

where he earned a degree in jurisprudence. Upon returning to Harvard, he attended Harvard Law School, graduating in 1966.

After graduation, he accepted a position with the law firm of Orr and Reno in Concord where he participated in a general law practice. Two years later he was appointed to be an assistant attorney general prosecuting criminal cases. He was soon promoted to deputy attorney general serving under Warren Rudman who later, as a senator, was his strong supporter for a position on the US Supreme Court. In 1976, he became attorney general for Governor Meldrim Thomson. As attorney general he was strongly against casino gambling in the State and prosecuted protesters at the Seabrook Nuclear Power Plant, then under construction. Also as attorney general, he appointed the state's first female criminal prosecutors.

Souter's career as a judge began in 1978, when he was appointed to the NH Superior Court. Five years later, Governor John Sununu nominated him to fill a vacancy on the NH Supreme Court. On this court he wrote opinions on a wide variety of topics, as the justices draw lots to determine who writes an opinion (unless they anticipate dissenting with the majority). During oral arguments, he was known to ask lawyers tough questions.

Prior to his nomination to the US Supreme Court in 1990, he was a judge briefly on the US First Circuit Court. With little known about how he might rule on crucial issues coming before the Court, reporters asked President Bush why he had selected this candidate. He replied, "I have selected a person who will interpret the Constitution and in my view not legislate from the Federal bench" ("Comments by President," 1990, p. 18). Further questioning of the President revealed that he did not have a so-called litmus test, such as a particular view of how any subsequent rulings on abortion would be made.

Before 1929, presidential nominees for the Supreme Court, if questioned at all by the Senate Judiciary Committee, were asked to testify in a private hearing. Like other nominees since that date, David Souter was questioned publicly by the committee; in his case, for three full days starting on September 13, 1990. During that time he did not tell the senators how he would rule on possible cases that could be heard by the court. He did, however, make clear to them how important he thought precedent to be, and was confirmed by the Senate on October 2.

Souter has become, according to some observers, an influential intellectual leader of the mainstream members of the Court. National news media such as the *New York Times* and the *Christian Science Monitor* have presented articles about his role within the Court. These articles emphasize his scholarship, his role as a leader of the moderates among the justices, and his adherence to *stare decisis* (follow precedent unless the reasons to change are overwhelming, thus providing stability). One area of the law in which Justice Souter seems to have a special interest is that of religious liberty and other individual liberties, an interest contrary to what many people expected from a Bush appointee.

Cases Not Included

For various reasons, not every case from New Hampshire was included in this book. Listed below are many of the cases which were excluded because they mostly concerned very technical points of law which are not of general interest.

Amoskeag National Bank v. Fairbanks	149 US 765
Bruce & Another v. Manchester & Keene Railroad	117 US 514
Concord First National Bank v. Hawkins	174 US 364
Healy v. Ratta	292 US 263
Lord and Jenness v. Goddard	54 US 198
Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co.	189 US 221
New Hampshire Department of Employment Security v. Pregent	417 US 903
Ogdensburg and Lake Champlain Railroad Co. v. Nashua and Lowell Railroad	112 US 311
Peck v. Jennes	48 US 612
Putnam v. United States	162 US 687
Railroad Company v. Androscoggin Mills	89 US 594
Ward v. Joslin	186 US 142
White v. State of New Hampshire	455 US 445
Whittmore v. Amoskeag National Bank	134 US 27

Glossary

abatement – reduction of taxes

abstinence – voluntary lack of indulgence

admiralty court – court authorized to resolve disputes over shipping, navigation and commerce both at sea and on navigable rivers and lakes

affirm – to uphold a lower court's decision

allege – to state without proof

amicus curiae – a friend of the court; a person or an organization who files a brief with the Court in support of one party to a case

appeal – to request a rehearing of a case by a higher court

arraign – to call a person before a court to answer an indictment

bankruptcy – legal procedure to declare a person or company unable to pay debts. Assets are then administered to benefit the creditors.

bond – a contractual promise by a borrower to repay a specified sum with interest by a certain date

brief – a document filed by an attorney with an appellate court which includes the facts in the case and legal arguments in support of the client

charter – a document issued by governmental authority to establish an educational institution, a corporation or to grant ownership of land

confiscate – to seize by governmental authority

contempt of court – disobedience to or open disrespect for a court and/or court orders

contraband – anything that is illegal to possess

contract – a binding agreement between two or more parties

defamation – civil wrong of injuring a person's good name

defendant – person accused of breaking a law or a person required to make an answer in a lawsuit

discharge – to release from an obligation

diversity jurisdiction – ability given to federal courts to hear cases involving state law if the opposing parties are citizens of different States

due process of law – idea that fair procedures must be followed if the government imposes a burden on an individual

embezzlement – the fraudulent taking of property entrusted to one's care

eminent domain – the power of a government to make a person give the government part or all of his property (See Part First, Article 12 of the NH Constitution and Amendment V, US Constitution.)

emitting – to throw out

equity – resolution of a dispute based on fairness

extradition – process for returning a person accused of a crime to the State or country where the offense occurred

facilitate – to make easier

felony – a serious crime

forgery – crime of falsely writing or altering a document

fugitive – person who tries to escape

gubernatorial – of or relating to a governor

immunity – protection from some action such as being charged with a crime or being sued

impressment – act of forcing someone into public service. For example, the British navy forced unwilling Americans to serve as sailors

indictment – a formal, written statement that expressed the findings of a grand jury and which charges a person with an offense

injunction – a court order to stop a specific action or to enforce a rule

letters of marque and reprisal – documents issued by a government authorizing private ship owners to arm their ships and to sail against an enemy's naval or commercial ships

libel – published defamation of a person

libels – formal documents that start an action in admiralty courts

misdemeanor – a minor crime; less serious than a felony

negligence – failure to use ordinary care

New Hampshire Bar Association – organization of attorneys admitted to practice law in this State

nonexempt – lack of release from a requirement

onerous – a burden

original jurisdiction – authority given to a court to be the initial court to hear a particular type of case

pauperism – state of being dependent on public poor funds

per curiam – by the court

per se – by oneself (representing self in court)

plaintiff – person who starts a lawsuit

police power – authority exercised by a government in domestic affairs (does not necessarily involve police officers)

prerequisite – precondition

privateer – ship sailing under the authority of letters of marque and reprisal

redress – remedy for grievances

release-dismissal agreement – signed agreement in which a person charged with an offense agrees not to sue government officials in return for having the charges dropped

reverse – to overturn the verdict of a lower court

reverse and remand – appellate court decision to overturn a lower court decision *and* to send the case back to the lower court for further action

security – freedom from danger, want, or deprivation

sedition – speech urging the overthrow of the government or resistance to lawful authority

self-perpetuating – capable of renewing oneself indefinitely

seriatim – in a series; one by one

sovereign immunity – concept that the government cannot be sued in court without its consent

special master – person appointed by a court to discover all relevant information in a dispute and to present recommendations to the court

statute of limitations – law assigning a time period after which legal action may not be taken

subpoena – legal document requiring a person to give testimony

subversive – person who tries to overthrow the existing government

syndic – person representing the creditors in a bankruptcy

teetotaling – abstinence from alcoholic drinks

tort – a civil wrong or injury, other than breach of contract

usurp – to seize without any legal right

uttering – giving someone a fake document knowing it is not genuine

waive – to relinquish, to give up

witness tampering – crime of trying to influence someone to either not testify or to testify falsely in court

writ of *certiorari* – order by the US Supreme Court granting the petitioner a review of his/her case

writ of *habeas corpus* – court order requiring a person already deprived of liberty be brought to the judge to determine if the detention is legal

writ of *mandamus* – court order compelling a government official to perform an official duty

Bibliography

This bibliography is divided for the convenience of students and teachers. The first section lists works that are general in nature; the second has more specialized works either by topic or by time period.

General

Alderman, Ellen and Caroline Kennedy. *The Right to Privacy.* New York: Knopf, 1995.

Cox, Archibald. *The Court and the Constitution.* Boston: Houghton Mifflin, 1987.

Garraty, John A. *Quarrels That Have Shaped the Constitution.* New York: Harper, 1975.

Harrell, Mary Ann. *Equal Justice Under Law. The Supreme Court in American Life.* Washington, D.C.: Supreme Court Historical Society, 1982.

Hyman, Harold M. and William M. Wiecek. *Equal Justice Under Law. Constitutional Development 1835–1875.* New York: Harper, 1982.

Kelly, Alfred H., et. al. *The American Constitution. Its Origins and Development.* New York: W.W. Norton, 1983.

Kutler, Stanley, ed. *The Supreme Court and the Constitution. Readings in American Constitutional History.* New York: W.W. Norton, 1984.

Irons, Peter. *The Courage of Their Convictions.* New York: Free Press, 1988.

The Oxford Companion to the Supreme Court of the United States. New York: Oxford University Press, 1992.

Schwartz, Bernard. *A History of the Supreme Court.* New York: Oxford University Press, 1993.

Swisher, Carl Brent. *American Constitutional Development.* Boston: Houghton Mifflin, 1943.

Wasby, Stephen L. *The Supreme Court in the Federal Judicial System.* New York: Holt, Rinehart and Winston, 1978.

Woodward, Bob and Scott Armstrong. *The Brethren.* New York: Simon and Schuster, 1979.

Specialized

Aldrich, J. *In Re Petition of Harry Kendall Thaw for Writ of Habeas Corpus.* New Hampshire: no publisher listed, 1914.

Anderson, Leon. *To This Day.* Canaan, NH: Phoenix Publishing, 1981.

Apple, R.W., Jr. "Bush's Move: Caution Wins." *New York Times.* 24 July 1990, A1+.

Baker, Paul R. Stanny. *The Gilded Life of Stanford White.* New York: Free Press, 1989.

Bell, Charles H. *The Bench and Bar of New Hampshire.* Boston: Houghton Mifflin, 1894.

Blocker, Jack S., Jr. *American Temperance Movements: Cycles of Reform.* Boston: Twayne Publishers, 1989.

Carr, Robert K. *The House Committee on Un-American Activities. 1945–1950.* Ithaca, NY: Cornell University Press, 1952.

Capowski, Vincent. "Levi Woodbury." *The Supreme Court Justices.* Ed. Clare Cushman. Washington, D.C.: Congressional Quarterly, 1993.

Cole, Donald B. *Jacksonian Democracy in New Hampshire, 1800–1851.* Cambridge, MA: Harvard University Press, 1970.

"Comments *by President on His Choice of Justice." New York Times.* 24 July 1990, A18.

Current, Richard N. *Daniel Webster and the Rise of National Conservatism.* Boston: Little, Brown & Co., 1955.

"David Souter." *Current Biography Yearbook, 1991.* New York: H.W. Wilson Company, 1991.

Dowd, Maureen. "Souter, New Hampshire Judge, Named by Bush For High Court; No 'Litmus Test' President Says." *New York Times,* 24 July 1990, A1+.

Fellman, David. *The Defendant's Rights.* New York: Rinehart and Company, 1958.

Gannett, Samuel S. *Report of Special Commissioner Appointed to Locate and Mark the Boundary Between the State of Vermont and the State of New Hampshire at the Points Specified Herein.* Washington, D.C.: Supreme Court of the United States, 1936. Reprinted by the New Hampshire Land Surveyors Association, 1979.

Garrow, David J. "Justice Souter Emerges." *New York Times.* 25 September 1994, sec. 6: 36+.

Greenhouse, Linda. "An 'Intellectual Mind'." *New York Times.* 24 July 1990, A1+.

Gunther, Gerald. *Learned Hand. The Man and the Judge.* New York: Knopf, 1994.

Hickey, Donald R. *The War of 1812: A Forgotten Conflict.* Urbana: University of Illinois Press, 1989.

Maclay, Edgar Stanton. *A History of American Privateers.* 1899. New York: Burt Franklin, 1968.

New Hampshire Attorney General. *Report on Subversive Activities.* By Louis C. Wyman. Manchester, NH: Granite State Press, 1955.

New Hampshire Interim Commission on Subversive Activities. *Report.* Concord, NH: no publisher listed, 1950.

Paine, Ralph D. *The Old Merchant Marine.* New Haven: Yale University Press, 1919.

Proceedings in Relation to the Death of Judge Woodbury. In 12 US iii–v.

Rantoul, Robert J. *Eulogy on the Hon. Levi Woodbury, Pronounced at Portsmouth, N.H., October 16, 1851, at the Request of the City Government.* Portsmouth, NH: C.W. Brewster and Son, 1852.

Remini, Robert V. *Andrew Jackson and the Course of American Democracy.* vols. II and III. New York: Harper and Row, 1981–1984.

Scheiber, Harry N. *Abbot-Downing and the Concord Coach.* Concord, NH: New Hampshire Historical Society, 1989.

Shirley, John M. *The Dartmouth College Causes and the Supreme Court of the United States.* St. Louis: G.I. Jones, 1879.

Sullivan, John J. "David H. Souter." *The Supreme Court Justices.* Ed. Clare Cushman. Washington, D.C.: Congressional Quarterly, 1993.

Turner, Lynn Warren. *The Ninth State: New Hampshire's Formative Years.* Chapel Hill: University of North Carolina Press, 1983.

Turner, Lynn W. *William Plumer of New Hampshire, 1759–1850.* Chapel Hill: University of North Carolina Press, 1962.

Upton, Richard Francis. *Revolutionary New Hampshire.* Port Washington, NY: Kennikat Press, 1970.

Winslow, Richard E., III. *"Wealth and Honour." Portsmouth During the Golden Age of Privateering, 1775–1815.* Portsmouth, NH: Portsmouth Marine Society, 1988.

"Woodbury, Levi." *Dictionary of American Biography.* 1936.